(17)

No. 00-24-CFX Title: PGA Tour, Inc., Petitioner
v.
Casey Martin

Docketed: July 5, 2000 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	May 15 2000	Application (99A943) to extend the time to file a petition for a writ of certiorari from June 4, 2000 to August 3, 2000, submitted to Justice O'Connor.
	May 17 2000	Application (99A943) granted by Justice O'Connor extending the time to file until July 5, 2000.
	Jul 5 2000	Petition for writ of certiorari filed. (Response due August 4, 2000)
	Aug 4 2000	Brief of respondent Casey Martin in opposition filed.
	Aug 16 2000	DISTRIBUTED for Conference of September 25, 2000
	Aug 16 2000	Reply brief of petitioner PGA Tour, Inc. filed.
	Sep 26 2000	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 13, 2000. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, December 13, 2000. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 29, 2000. Rule 29.2 does not apply. SET FOR ARGUMENT January 17, 2001. **********
	Oct 30 2000	Brief amicus curiae of Kenneth R. Green, II filed.
	Nov 7 2000	Record filed.
	Nov 13 2000	Joint appendix filed.
	Nov 13 2000	Brief of petitioner PGA Tour, Inc. filed.
	Nov 13 2000	Brief amici curiae of ATP Tour, Inc. and the Ladies Professional Golf Association filed.
	Nov 13 2000	Brief amicus curiae of Equal Employment Advisory Council filed.
	Nov 13 2000	Brief amicus curiae of United States Golf Association filed.
	Nov 21 2000	Record filed.
	Nov 21 2000	Record filed.
	Dec 4 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Dec 5 2000	CIRCULATED.
	Dec 8 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DISTRIBUTED.
	Dec 11 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Dec 12 2000	Brief amici curiae of American Association of Adapted Sports Programs, et al. filed.
	Dec 13 2000	Brief of respondent Casey Martin filed.
	Dec 13 2000	LODGING consisting of twenty copies of a video of trial

2 pp

Entry	Date	Proceedings and Orders
		exhibit 98, submitted by counsel for the respondent.
	Dec 13 2000	Brief amicus curiae of K-T Support Group filed.
	Dec 13 2000	Brief amici curiae of National Assn. of Protection and Advocacy Systems, et al. filed.
	Dec 13 2000	Brief amici curiae of Robert Dole, et al. filed.
	Dec 13 2000	Brief amicus curiae of United States filed.
	Dec 28 2000	Reply brief of petitioner PGA Tour, Inc. filed.
	Jan 17 2001	ARGUED.

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Supreme Court, U.S.
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No. ——

IN THE

Supreme Court of the United States

PGA TOUR, INC.,

Petitioner,

v.

CASEY MARTIN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Title III of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, regulates standards established for competitors (here, professional golfers) in athletic competitions held at places of public accommodation.

2. Whether, if so, Title III requires professional sports organizations to grant selective waivers of their substantive rules of athletic competition in order to accommodate disabled competitors.

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IN THE

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No. ___

PGA TOUR, INC.,
Petitioner,

v.

CASEY MARTIN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, PGA TOUR, Inc.,[1] respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 204 F.3d 994. The opinions of the district court (Pet. App. 16a-40a, 41a-55a) are reported at 994 F. Supp. 1242 and 984 F. Supp. 1320.

[1] Petitioner, PGA TOUR, Inc., does not have any parent corporations, subsidiaries, or affiliates that have issued shares to the public.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 6, 2000. On May 17, 2000, Justice O'Connor extended the time to file a petition for a writ of certiorari to and including July 5, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, are set forth in the appendix to this petition at Pet. App. 56a-96a.

STATEMENT

This case raises the questions whether the "public accommodations" provisions of Title III of the Americans with Disabilities Act (the "ADA" or "the Act"), 42 U.S.C. § 12101 *et seq.*, extend to the competitors in a professional sports competition, and, if so, whether the Act requires waiver of a substantive rule of the competition so that a disabled person can compete. The district court held that Title III of the Act did apply and that Title III mandated waiver of a substantive rule unless it could be shown that the waiver would give the disabled competitor an unfair advantage over a hypothetical able-bodied competitor. The court of appeals affirmed.[2]

A. The issues in this case arise out of a challenge by respondent, a disabled professional golfer, to one of the competitive rules applicable to certain golf tournaments sponsored by PGA TOUR, Inc. (the "Tour")—specifically the so-called "walking rule," which requires golfers to walk the

[2] As we discuss later, the decision of the Ninth Circuit conflicts with a decision of the Seventh Circuit holding that waiver of a substantive competitive rule—indeed, the same rule at issue here—is not required by Title III. *See Olinger v. United States Golf Ass'n*, 205 F.3d 1001 (7th Cir. 2000).

course during the competition. The tournaments, part of the PGA TOUR and the Buy.com TOUR (formerly the NIKE TOUR), test the ability of professional golfers to perform at the highest levels of golf competition.[3] Of the approximately 25 million golfers in the United States, only about 200 are eligible to play in PGA TOUR events each year, and only about an additional 170 are eligible to play in Buy.com TOUR events. Both PGA TOUR and Buy.com TOUR competitions are, by design, among the most difficult and challenging golf tournaments in the world.

The Tour carefully tailors its substantive rules to define the nature of its high-level competitions.[4] In addition to other rules specified by the "hard card," the Tour invokes several of the so-called "optional rules" from the Rules of Golf, which are explicitly intended to make competitions more exacting.[5] For example, the rules invoked by the Tour include the "one-ball rule," requiring competitors to use the same brand and type of

[3] PGA TOUR, Inc., a non-profit entity formed in 1968 to promote high-level golf competition and golf tournaments for its members, sponsors golf competitions for its members on three professional golf tours: the PGA TOUR, the Buy.com TOUR, and the SENIOR PGA TOUR. Respondent is not eligible to compete on the SENIOR PGA TOUR, which is limited to golfers age fifty and older, and this lawsuit involves only PGA TOUR and Buy.com TOUR (formerly NIKE TOUR) events. All references herein to "Tour events" and the like are to tournaments on those tours, not on the SENIOR TOUR.

[4] The rules governing Tour competitions come from three sources: (1) the Rules of Golf, as promulgated by the United States Golf Association ("USGA") and the Royal and Ancient Golf Club of St. Andrews, Scotland; (2) the Conditions of Competition and Local Rules (the so-called "hard card"), containing additional rules applicable specifically to all Tour events; and (3) the Notice to Competitors, containing certain tournament-specific rules.

[5] Among the rules prescribed by the "hard card" is a rule requiring competitors to use only "conforming" golf ball brands that satisfy objective USGA standards. This rule eliminates the competitive differences that would result if players used widely differing golf balls.

golf ball throughout a round. Taking account of the fact that different types of golf balls perform differently in wind and other conditions when struck by highly-skilled golfers, this rule makes the competition more demanding by preventing a competitor from, among other things, using one type of ball when hitting into the wind, and another type when hitting with the wind. The violation of any substantive rule results in a penalty or disqualification.

The Tour competitions—like every other elite golf competition in the world—require that players walk the golf course during tournaments.[6] This "walking rule," which has been part of Tour events from their inception, is specifically intended to add the element of stress and fatigue to the competition. During four days of competition, a golfer typically must walk twenty to twenty-five miles, often in heat, inclement weather, or over hilly terrain. The cumulative fatigue resulting from this requirement may, and frequently does, affect golfers' concentration, shot-making ability, and overall performance. The extent of such fatigue is impossible to quantify but will vary from golfer to golfer, depending upon factors like weather conditions, temperature, the terrain of the golf course, different golfers' psychological ability to cope with stress, the golfers' age and extent of physical conditioning, and so forth.[7]

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[6] The PGA TOUR "hard card" provides: "Players shall walk at all times during a stipulated round unless permitted to ride by the PGA TOUR Rules Committee." The Buy.com TOUR "hard card" contains virtually identical language. The Rules Committee can permit players to ride only in those limited instances when, due to unusual course configuration or for safety reasons (*e.g.*, crossing streets), it is deemed appropriate to shuttle all players short distances during an event. The Rules Committee cannot permit, and never has permitted, a competitor to use a golf cart in the competition itself.

[7] The Tour also takes steps to make the course conditions for its events more adverse than usual. For example, the rough (the area beside the fairway) is grown longer than normal, pins are placed in more difficult positions on the greens, and tee boxes are moved back to maximize the distance on each hole. The Tour uses these and other measures to define the nature of its high-level competitions, distinguishing them from recreational golf and other less exacting competitions, including its own SENIOR TOUR.

The Tour has long maintained that, to ensure the integrity of its competitions and to maintain public confidence, all competitors must observe the substantive rules established for a particular tournament. As a result, the golfers participating in Tour events are required to compete under the same conditions. No competitor is given an allowance or advantage because of differences in strength or other physical characteristics. Tournament officials monitor each Tour event, and players themselves are obligated to report any violation of the rules.

B. Respondent Casey Martin is a professional golfer who suffers from Klippel-Trenaunay-Weber Syndrome, a congenital vascular condition that precludes blood from properly re-circulating up his right leg. This condition interferes with his ability to walk, and causes him pain. Respondent thus has difficulty in walking the required distances in professional golf tournaments sponsored by the Tour.

In 1997, respondent entered the Tour's National Qualifying Tournament, which is used to select members for the NIKE TOUR (now the Buy.com TOUR) and PGA TOUR. At the final stage, during which the "walking rule" is invoked, respondent sought permission to use a golf cart. The Tour, in accordance with its rules, denied the request. Respondent then filed this action, under 28 U.S.C. § 1331, seeking a preliminary and permanent injunction against enforcement of the "walking rule" in the Qualifying Tournament and in subsequent Tour competitions for which he qualified.

Respondent alleged that the refusal of the Tour to waive the "walking rule" violated both Title I and Title III of the Act. His "Employment Discrimination" claim under Title I asserted that he was a "qualified individual with a disability," Excerpts of Record, C.A. 9 at 17; 42 U.S.C. § 12111(8),[8] and that the Tour

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[8] Section 12111(8) reads: "The term 'qualified individual with a disability' means an individual with a disability who, with or without

had "discriminated against him because of his disability in regard to job application procedures, hiring, advancement, employment compensation, job training and other terms, conditions, and privileges of employment . . . ." Excerpts of Record, C.A. 9, at 17; 42 U.S.C. § 12112(a).[9] His "Public Accommodation Discrimination" claim under Title III alleged, among other things, that the Tour had failed to "provide [respondent] with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others in the PGA Qualifying Tournament, the NIKE TOUR or the PGA TOUR events." Excerpts of Record, C.A. 9, at 11. *See* 42 U.S.C. § 12182(a).[10] Respondent further stated that "[b]ecause of [his] disability, [he] cannot effectively compete in the PGA Qualifying Tournament, the NIKE TOUR or the PGA TOUR events or obtain compensation, benefits, privileges or advantages from the Qualifying Tournament, the NIKE TOUR o[r] the PGA TOUR events unless he is permitted

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reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."

[9] Section 12112(a) reads: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."

[10] Section 12182(a) reads: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." Respondent also sought relief under 42 U.S.C. §12189, claiming that the NIKE TOUR was a course or examination related to professional credentialing and that the "walking rule" constituted discrimination in this examination.

to use a golf cart in the PGA Qualifying Tournament, the NIKE TOUR and the PGA TOUR events." Excerpts of Record, C.A. 9, at 11.

The district court rejected the Title I claim, finding that respondent was an independent contractor, not an employee of the Tour, and thus not covered by Title I. Pet. App. 25a. The court held, however, that Title III required a waiver of the "walking rule." In reaching this conclusion, the district court first resolved the threshold issue whether Title III, which addresses the provision of goods and services at "places of public accommodation," applies to *competitors* in a sporting event viewed by the public, determining that Title III extends not just to "those areas actually accessed by the public at large," Pet. App. 52a, but to the "playing area" as well. Pet. App. 53a. Based on that theory, the court concluded that Title III required organizations operating places of public accommodation to modify their policies for persons competing within the playing area, as well as for spectators and other attendees at the event. Pet. App. 54a-55a.

The district court further held that a waiver of the "walking rule" for respondent would not "fundamentally alter" the nature of Tour events. *See* 42 U.S.C. § 12182(b)(2)(A)(ii).[11] The court acknowledged that the "walking rule" is a substantive rule of Tour events, not a mere rule of style or tradition, expressly finding that it is intended to affect those competitions by "inject[ing] the element of fatigue into the skill of shot-making." Pet. App. 32a-33a. Notwithstanding that finding, however, the court agreed that it was proper to make "an

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[11] Section 12182(b)(2)(A)(ii) defines as discrimination: "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would *fundamentally alter* the nature of such goods, services, facilities, privileges, advantages, or accommodations" (emphasis added).

individualized inquiry into the necessity of the walking rule *in Casey Martin's case . . . ,*" Pet. App. 29a (emphasis added), asking whether his use of a golf cart would give him an unfair competitive advantage. After stating that, for an able-bodied competitor, "the fatigue factor injected into the game of golf by walking the course cannot be deemed significant under normal circumstances," Pet. App. 33a, the district court concluded that, because of his disability, the "fatigue [Martin] endures . . . is undeniably greater than the fatigue injected into tournament play on the able-bodied by the requirement that they walk from shot to shot." Pet. App. 35a. The court thus decided that the purpose of the "walking rule"—to subject competitors to the added element of stress and fatigue—was satisfied with respect to respondent by virtue of his disability, and it enjoined the Tour from requiring him to comply with the rule.

C. The Ninth Circuit affirmed. Like the district court, it first declined to draw a distinction, for purposes of applying Title III, between competitors within the playing area of a golf course and spectators in areas open to the general public. Noting that "golf courses are public accommodations," Pet. App. 4a (citing 42 U.S.C. § 12181(7)(L)), the court of appeals found no reason to "compartmentalize golf courses during tournaments" (Pet. App. 6a) by treating players competing for prize money "inside the ropes" differently from persons enjoying the tournament "outside the ropes." Dismissing arguments to the contrary, the court declared pointedly that there was no "justification for drawing a line between use of a place of public accommodation for pleasure and use in the pursuit of a living." Pet. App. 8a.

The Ninth Circuit then held that a waiver of the "walking rule" for respondent would not impermissibly transform Tour competitions. Although the Ninth Circuit did not question that the "walking rule" was a valid substantive rule, Pet. App. 9a-10a, it rejected the argument that waiver of any substantive rule—by destroying the uniformity of rules for all competitors—fundamentally alters the nature of a high-level

athletic competition. Rather, the court of appeals made an "individualized determination" (Pet. App. 14a) to assess whether a waiver for respondent, but not other competitors, would give him an "unfair advantage." Pet. App. 13a; *see also* Pet. App. 12a ("[t]he issue here is not whether use of carts generally would fundamentally alter the competition, but whether the use of a cart by Martin would do so"). Pointing to the district-court finding that the fatigue caused by walking during a golf tournament "cannot be deemed significant under normal circumstances," Pet. App. 10a (internal quotation marks omitted), the Ninth Circuit agreed that "providing Martin with a golf cart would not give him an unfair advantage over his competitors." Pet. App. 15a.[12]

REASONS FOR GRANTING THE WRIT

The decision of the Ninth Circuit in this case—a decision that is squarely contrary to a decision of the Seventh Circuit on essentially the same facts (*see Olinger v. United States Golf Ass'n*, 205 F.3d 1001 (7th Cir. 2000))—presents two important questions regarding application of the Americans with Disabilities Act (42 U.S.C. § 12101 *et seq.*): *first*, whether Title III of the Act regulates standards established for competitors (here, professional golfers) in athletic competitions held at places of public accommodation; and, *second*, whether, if so, Title III compels professional sports organizations to grant selective waivers of their substantive rules in order to accommodate disabled competitors. The Ninth Circuit held that the provisions of Title III are intended to govern, not just the enjoyment of goods and services by persons attending Tour events, but also the requirements set for golfers earning their living as part of the events themselves. Pet. App. 4a-8a. The

[12] The Ninth Circuit did not address respondent's alternative arguments, rejected by the district court, that respondent was an employee of the Tour covered by Title I and that the NIKE TOUR competitions were a "course or examination" under Title III. Pet. App. 15a n.10.

court then barred the Tour from applying its competitive rules uniformly to disabled and non-disabled golfers, holding that it must grant waivers to disabled competitors so long as they would not gain an unfair advantage. Pet. App. 8a-15a. Both of these rulings warrant review by this Court.[13]

The threshold question—whether Title III applies to standards for professional golfers competing at places of public accommodation—is an issue of enormous potential consequence. Although Title III clearly prohibits discrimination against persons seeking to patronize places of public accommodation, it is a considerable expansion of Title III to say that it is also meant to regulate job requirements for persons, like respondent, engaged in producing goods and services for the public. Not only are such persons often operating within areas closed to the public at large, but, in addition, Title I of the Act (the "Employment" title) has generally been regarded as the primary, if not exclusive, section of the Act dealing with possible discrimination against individuals in the private workplace. *See, e.g., Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997); *see also* H.R. Rep. No. 101-485, pt. 2, 101st Cong., 2d Sess. 99 (1990) (House Report) ("employment practices are governed by Title I of this legislation"). While Title I provides broad, far-reaching protections for disabled workers, those protections are granted within specified limits: as it did in other leading civil rights statutes, *see, e.g.*, 42 U.S.C. § 2000e-2000e-17 (West 1994 & Supp 1998) (Title VII of the Civil Rights Act of 1964),

[13] This Court, in recent years, has frequently granted review to address important issues regarding construction and application of the Americans with Disabilities Act. *See Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581 (1999); *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Bragdon v. Abbott*, 524 U.S. 624 (1998); *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206 (1998). *See also Garrett v. Univ. of Alabama at Birmingham Bd. of Trustees*, 193 F.3d 1214 (11th Cir. 1999), *cert. granted*, 120 S. Ct. 1669 (2000) (No. 99-1240).

Congress extended protection only to certain workers (most particularly, employees and not independent contractors) and imposed obligations only on certain "covered" employers (most particularly, businesses with at least 15 employees). *See Birchem v. Knights of Columbus*, 116 F.3d 310, 312 (8th Cir. 1997) (ADA does not apply to independent contractors). By deciding that Title III (the "Public Accommodations" title) regulates job-related requirements at places of public accommodation, the Ninth Circuit has suddenly turned Title III into a full-blown extension of Title I, opening the door to workplace discrimination suits by non-employees (like respondent, who is an independent contractor) and suits against businesses with just a few employees (provided only that they fit within the broad definition of "public accommodation"). Even more strikingly, it has done so even though there appears to be not one word in the text of Title III, or the pertinent legislative history, to suggest that Congress had any such intent. This sweeping holding itself calls out for further review.

The second issue—whether (if applicable) Title III requires professional sports organizations to waive their substantive competitive rules for disabled competitors—is likewise serious and important.[14] So far as we are aware, no court has ever before held that a professional sport must waive a legitimate competitive rule to enable a would-be participant, disabled or not, to more successfully compete. Indeed, on the day following the decision below, the Seventh Circuit held, in a case with basically identical facts, that the United States Golf Association did not have to grant waivers of its "walking rule" (the same rule at issue here) for disabled professional golfers.

[14] As the term has been used in this litigation, a substantive rule is a rule that is intended to, and potentially does, affect the outcome of a particular competitive event. The term is used to distinguish those rules from various rules that are not intended to affect the outcome—for example, rules of dress or decorum—which, unlike the "walking rule," could be waived for all competitors without altering the basic nature of the competition.

See Olinger v. United States Golf Ass'n, supra. Unlike the Ninth Circuit, the Seventh Circuit recognized that selective waivers of a competitive rule are inconsistent with the fundamental principle, essential to high-level athletic competition, that participants must play according to the same set of rules, so that differences in physical performance may be accurately measured and rewarded. *See Olinger*, 205 F.3d at 1006. Also, again unlike the Ninth Circuit, the Seventh Circuit specifically declined to simulate the results of genuine competition by engaging in a hypothetical "individualized determination" to estimate whether a competitor exempt from a rule would have a competitive advantage over competitors subject to the rule. The very nature of that inquiry—substituting hypothesis for verifiable results—is contrary to the premise of high-level competitive athletics: that actual performance, under uniform rules, determines who does and does not have a competitive advantage.

The decision below bars the Tour from requiring that all competitors at its events play by the same rules. By contrast, as a result of the holding in *Olinger*, the United States Golf Association has the continuing right to establish and enforce its rules, including the "walking rule," for all golfers equally.[15] There is no rational reason for this difference. While we believe that the Seventh Circuit is correct, and the Ninth Circuit mistaken, the question whether professional sports organizations must change their competitive rules to accommodate disabled athletes is, in any event, a question of considerable significance. Review by this Court is necessary to provide authoritative guidance.

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[15] That right is now open to question, however. A recent lower-court decision enjoined the United States Golf Association from applying its "walking rule" to a disabled competitor. *See Jones v. United States Golf Ass'n*, No. OOCA278JN (United States District Court for the Western District of Texas) (June 14, 2000).

1. The first problem with the decision below is its erroneous, and potentially momentous, determination that Title III of the Act was meant to govern the terms and conditions set for professional golfers competing at places of public accommodation.[16] This holding not only stretches Title III beyond its intended boundaries but also upsets much of the legislative balance reflected in the broad, but not unlimited, reach of Title I.

Although the Ninth Circuit correctly observed that "golf courses are public accommodations," Pet. App. 4a, that observation is the beginning, not the end, of the relevant inquiry regarding application of Title III to this case. As the record makes plain (*see* Excerpts of Record, C.A. 9, at 10-12, 16-18), respondent does not claim that discrimination prevents him from equal enjoyment of the golf courses operated by the Tour for purposes of "exercise or recreation," 42 U.S.C. § 12181(7)(L), or from full and equal access to those courses as a spectator at public Tour events. Respondent makes a very different claim: that the refusal of the Tour to waive its rule requiring all competitors to walk the course prevents him from earning a living as a member of the Tour.[17] The question, then, is whether, even accepting the fact that golf courses are generally regarded as public accommodations, Title III dictates the terms and conditions of the Tour *competitions* held at those courses. The Ninth Circuit concluded that it does. Refusing to draw a distinction between spectators at a golf course and golfers in a tournament that they are watching, the court of

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[16] The Seventh Circuit in *Olinger* discussed, but ultimately did not resolve, the question whether Title III applies at all to the part of the golf course on which the competitors play. *See* 205 F.3d at 1004-05. It found that, in any event, the use of a cart by some competitors would "fundamentally alter the nature of the competition." *Id.* at 1005.

[17] In his complaint, respondent made essentially the same claim under both Title I and Title III of the Act. Relief was denied under Title I but granted under Title III. *See* pages 5-8 *supra*.

appeals held that, for purposes of applying Title III, there is no difference "between use of a place of public accommodation for pleasure and use in the pursuit of a living." Pet. App. 8a.

This holding, at a minimum, requires an awkward reading of Title III. By treating the viewing areas and playing fields of a professional sport as largely fungible, the Ninth Circuit has blurred, even obliterated, the line separating those *enjoying* the goods and services of a public accommodation from those *providing* the goods and services. Although a public accommodation is, by its very nature, open to the public in some respects, many places of public accommodation are made up of areas that are fully open to patrons and attendees and other areas that are principally reserved for persons working there. (Here, for example, the competitors "inside the ropes," like respondent, are competing for prize money as part of the entertainment viewed by members of the general public "outside the ropes." *See* Pet. App. 46a).[18] The provisions of Title III, however, principally aim at prohibiting discrimination with respect to persons seeking "full and equal enjoyment" of goods and services, 42 U.S.C. § 12182(a)—language that does not readily incorporate persons engaged in producing the goods and services. *See* House Report, pt. 2, at 100 ("people with disabilities should have equal access to the array of establishments that are available to others who do not currently have disabilities"). *See also* pages 16-17 *infra*. The decision by the Ninth Circuit thus contradicts the most natural reading of Title III itself.

The decision to apply Title III to competitors in a professional tournament also wreaks havoc with the overall

[18] For these purposes it makes no difference whether the golf courses are regarded as public accommodations because they are places of exercise or recreation or because they are places of exhibition or entertainment. *See* Pet. App. 5a. In either case, the golfers are part of the entertainment that the public comes to see. *See also* 28 C.F.R. Ch. I, pt. 36, app. B, at 623-24.

structure of the Act. As the text and legislative history of the Act demonstrate, it is Title I, not Title III, that addresses possible work-related discrimination, including the failure of business organizations to make reasonable changes in work requirements. The fact that respondent is not covered by Title I—his Title I claim was correctly rejected because he is an independent contractor, not an employee (Pet. App. 25a)—does not mean, as the Ninth Circuit apparently assumed, that he is merely remitted to obtaining relief under Title III: it means that the Act as a whole simply does not address possible private workplace discrimination against independent contractors. In that regard, the Act is no different from other federal civil rights laws, which make the same distinction. *See, e.g., Alexander v. Rush N. Shore Med. Ctr.*, 101 F.3d 487, 491-92 (7th Cir. 1996) (independent contractors not protected by Title VII of Civil Rights Act); *Equal Employment Opportunity Comm'n v. Zippo Mfg. Co.*, 713 F.2d 32, 35-38 (3d Cir. 1983) (independent contractors not protected by Age Discrimination in Employment Act). *See also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-27 (1992).

It is thus a serious error for the Ninth Circuit to read into Title III what Congress, dealing directly with the subject, quite deliberately left out of Title I. The text of Title I squarely and extensively addresses the subject of discrimination in the workplace, prohibiting discrimination against a "qualified individual with a disability" with respect to "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). The term "qualified individual with a disability" is itself defined in job-related terms, *i.e.*, whether the disabled person can, with or without accommodation, "perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). This emphasis on work-related matters is then carried forth throughout the specific anti-discrimination

provisions of Title I, which commonly and repeatedly speak in terms of "job applicant[s] and employee[s]" (*id.*at § 12112(b)(1)), "equal jobs and benefits" (*id.* at § 12112(b)(4)), "employment opportunities" (*id.* at § 12112(b)(5)(B)), "job-related" standards or criteria (*id.* at § 12112(b)(6)), and the like. For all their breadth, however, these provisions generally protect only "employees" (or prospective employees) and place obligations only on "covered employers." *See id.* at § 12111-12112. *See also Birchem v. Knights of Columbus, supra.*

The provisions of Title III are addressed to a very different subject: the equal enjoyment of goods and services by members of the public. *See generally* 42 U.S.C. §§ 12181-12189. Nowhere in its operative or definitional sections is there any mention of jobs or workers, much less the enumeration of specific standards to address possible discrimination with regard to work-related terms, conditions, or privileges. The focus of the anti-discrimination provisions of Title III is on prohibiting discrimination in the *marketplace*—that is, discrimination denying full enjoyment of goods and services offered by places of public accommodation—not discrimination in the *workplace*. *See generally* 42 U.S.C. § 12182(a) (General Rule), § 12182(b)(1) (General Prohibition), § 12182(b)(2) (Specific Prohibitions). Thus, even though an organization operates a place of public accommodation (like a golf course or a restaurant), it does not follow that Title III can be stretched to regulate the job-related standards for workers helping to provide its goods or services to the public. Not only is that intention absent from Title III as a whole, but it is inconsistent with the reasonable inferences to be drawn from more specific subsections suggesting that Title III is aimed at "clients or customers" at places of public accommodation. *See* 42 U.S.C. §12182(b)(1)(A)(iv) ("For purposes of clauses (i) through (iii) of this subparagraph, the term 'individual or class of individuals' refers to the clients or customers of the covered

public accommodation that enters into the contractual, licensing or other arrangement").[19]

The legislative history of the Act, insofar as it may be relevant, is to the same effect. Most notable is language in the House Report, which states, in the plainest terms, that "Title III is not intended to govern any terms or conditions of employment by providers of public accommodations or potential places of employment; employment practices are governed by title I of this legislation." House Report, pt. 2, at 99. In keeping with this straightforward assertion, the analysis of Title I in the House Report is, like the text of Title I itself, replete with discussion about what does, and does not, constitute discrimination in the workplace. *See* House Report, pt. 2, at 54-83, pt. 3, at 31-49. By contrast, the analysis of Title III, like the text of Title III, contains no discussion whatsoever of discrimination with respect to job terms and conditions, instead addressing the ability of the public (*i.e.*, clients or customers) to gain full and equal enjoyment of the goods and services provided by places of public accommodation. *See* House Report, pt. 2, at 99-129, pt. 3, at 53-69.[20]

The Ninth Circuit nevertheless held that Title III applies equally to persons in work areas and to persons in areas

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[19] The Tour has agreed that Title III requires reasonable accommodations for disabled patrons at a golf tournament, but it has repeatedly maintained that Title III does not impose similar requirements with respect to competitors playing in the tournament. As noted in the text, the Ninth Circuit held that Title III applied to spectators and competitors alike.

[20] The House Report does indicate that new construction and alterations to existing facilities generally should make both work and public areas accessible to disabled persons at public accommodations and "commercial facilities." *See* House Report, pt. 2, at 116-21, pt. 3, at 62-66; 42 U.S.C. § 12183. The Report makes clear, however, that this provision is not meant to convert Title III into a demi-version of Title I, imposing a supplemental set of job standards for individual employees at public accommodations. *See* House Report, pt. 2, at 117. "The legal requirements of the two titles . . . are separate and independent." *Id.*

generally open to the public. But this reading makes little sense. Why would Congress have deliberately limited coverage in Title I of the Act only to expand it dramatically—and with no mention of doing so—in Title III? And, if Congress had wanted to extend the protections of the Act to independent contractors, and to workers at businesses with only a small number of employees, why would it take that step—again, without any discussion—only for places of public accommodation? It seems far more likely that, if this broadened coverage were what it had in mind, Congress would have addressed the matter openly in Title I, thereby assuring that any allegations of discrimination in the private workplace were analyzed according to consistent, and job-specific, standards. The decision not to do so should be given effect, not nullified by a misreading of provisions aimed at a different problem.[21]

The potential consequences of applying Title III to job-related requirements for persons working at places of public accommodation are truly far-ranging. The definition of a "public accommodation" includes, among other things, most places of lodging, restaurants, retail establishments (grocery stores, hardware stores), service establishments (dry cleaners, lawyers' offices, pharmacies, doctors' offices), schools (from nursery through postgraduate), day-care centers, and bowling alleys, *see* 42 U.S.C. § 12181(7)(A)-(L)—many of which, it may be assumed, have only a small number of employees and

[21] The effort to apply other titles of the Act to workplace discrimination is not limited to this case. There is a split among federal courts of appeals regarding whether *Title II* (the "Public Services" title) applies to the terms and conditions of employment for government workers. *Compare Zimmerman v. Oregon Dept. of Justice*, 170 F.3d 1169 (9th Cir. 1999), petition for certiorari (No. 99-243) filed August 10, 1999, with *Bledsoe v. Palm Beach County Soil & Water Conservation Dist.*, 133 F.3d 816 (11th Cir.), *cert. denied*, 119 S. Ct. 72 (1998); *Holmes v. Texas A & M Univ.*, 145 F.3d 681 (5th Cir. 1998); *Doe v. Univ. of Maryland Med. Sys.*, 50 F.3d 1261 (4th Cir. 1995). Because the wording and legislative history of Title II and Title III are somewhat different, the questions posed by those cases are similar, but not identical, to the questions presented here.

utilize, at least on occasion, independent contractors to provide goods and services to the public. Pursuant to the decision below, it now appears that hiring or other job-related decisions at each of those establishments is subject to challenge under the Act, just like the decisions of employers that Congress deliberately made subject to coverage under Title I. *See also Menkowitz v. Pottsdown Memorial Med. Ctr.*, 154 F.3d 113 (3d Cir. 1998) (applying Title III to independent contractor), *cited with approval* at Pet. App. 6a; *see also id.* at 125-28 (Scirica, J., dissenting). Indeed, workers (or potential workers) bringing claims under Title III would actually be in a *preferred* position because they would not have to comply with the procedural requirements of Title I, including the directive to file a timely charge with the Equal Employment Opportunity Commission. *See* 42 U.S.C. § 12117(a) (incorporating charge requirement for claims of discrimination under Title I). *See also Patterson v. McLean Credit Union*, 491 U.S. 164, 180 (1989) (rejecting expansive reading of 42 U.S.C. § 1981 in part because it would "undermine the detailed and well-crafted procedures for conciliation and resolution of Title VII claims").

There is no justification for this judicial restructuring of the Act. While Congress indisputably sought to expand employment opportunities for disabled individuals, it did so in a specific way, identifying the businesses and workers that it intended to make subject to the Act. By its refusal to distinguish between consumers and providers of goods and services, the Ninth Circuit read these limitations out of the Act, making Title III a backstop for claims of workplace discrimination not covered by Title I. This unwarranted expansion of the Act merits review by this Court.

2. The second holding of the Ninth Circuit—that Title III requires professional sports organizations to grant waivers of their substantive rules of competition to accommodate disabled competitors—is also of genuine importance. Rejecting the argument that forced waivers in and of themselves would

"fundamentally alter" the nature of high-level athletic competitions, Pet. App. 11a, 42 U.S.C. § 12182(b)(2)(A)(ii), the Ninth Circuit chose instead to make an "individualized determination," Pet. App. 14a, asking whether a waiver of a particular rule for a particular competitor would give him an "unfair advantage." Pet. App. 13a. Relying on the dissent in *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 932 (8th Cir. 1994) (R. Arnold, C.J., dissenting), which dealt with age limits for high-school athletes, the court of appeals reasoned that, if no advantage is conferred, the waiver does not fundamentally alter the particular competition. *See* Pet. App. 10a-15a. The court found no reason for concern here, determining that the fatigue incurred by respondent even with a cart meant that he would not gain "an unfair advantage over his competitors." Pet. App. 15a.

This decision stands in direct contrast to a decision of the Seventh Circuit, handed down the very next day, that came to just the opposite conclusion. *See Olinger v. United States Golf Ass'n, supra*. Relying on the majority opinion in *Pottgen*, rather than the dissent, the Seventh Circuit recognized that "the ADA does not require entities to change their basic nature, character, or purpose insofar as that purpose is rational, rather than a pretext for discrimination." 205 F.3d at 1005. Applying that standard, the court of appeals declined to examine the "personal circumstances" of the disabled golfer in that case (205 F.3d at 1005)—that is, *declined* to make an "individualized determination"—noting instead the importance of "a uniform set of rules for all golfers." *See* 205 F.3d at 1006. The Seventh Circuit quoted with approval from the opinion of the district court, stating that "[t]he point of an athletic competition . . . is to decide who, under conditions that are about the same for everyone, can perform an assigned set of tasks better than (not as well as) any other competitor." 205 F.3d at 1006 (internal quotation marks omitted). It then upheld uniform application of

exactly the same rule that the Ninth Circuit had required the Tour to waive for respondent.[22]

The issue at the core of these contradictory holdings is whether high-level professional sports can require all competitors, disabled or not, to perform according to a uniform set of substantive rules. The Ninth Circuit (like the Seventh Circuit) acknowledged that the "walking rule" is a *bona fide* substantive rule (Pet. App. 9a-10a)—though not, in its view, an especially important one "under normal circumstances" (Pet. App. 10a)—but that court (unlike the Seventh Circuit) went on to conclude that waiver of a substantive rule does not "fundamentally alter the competition" as long as the disabled competitor would not gain an unfair advantage. *See* Pet. App. 10a-15a. This attempt at judicial "balancing," however, misses the essential point. The question is not whether, on a hypothetical basis, a waiver would or would not skew the results of a particular competition, but whether the waiver, by establishing different rules for different players, would *fundamentally alter the nature* of that competition. *See* 42 U.S.C. § 12182(b)(2)(A)(ii); *Southeastern Community College v. Davis*, 442 U.S. 397, 410 (1979). On that point the Seventh Circuit understood what the Ninth Circuit did not: that the nature of demanding, high-level athletic competition requires that competitors be tested under the same rules.[23] A particular

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[22] Petitions for rehearing and rehearing *en banc* in *Olinger* were denied on June 22, 2000.

[23] Although the Ninth Circuit apparently thought otherwise, Pet. App. 12a, the right to conduct competitions according to uniform substantive rules cannot turn on whether a particular rule, looked at in isolation, is deemed "fundamental to the competition." First of all, the Ninth Circuit does not (and, we think, could not) explain how to tell a "fundamental" substantive rule from a "non-fundamental" one, an inquiry that is inevitably standardless and subjective. Second, the distinction—even if there were one—is immaterial: *all* substantive rules, by definition (*see* note 14 *supra*), are meant to, and do, potentially affect the outcome of the competition, and, therefore, to assure a fair and equal test, all competitors must abide by all of them.

set of rules may, of course, put some competitors at a physical disadvantage, but that fact simply reflects the difficulties faced, to a greater or lesser degree, by all competitors in top-level athletic events. Those events, by their very nature, are intended to measure differences in physical performance.[24]

The Seventh Circuit thus was quite right to reject the idea of a hypothetical "individualized determination" in order to estimate whether a certain competitor, if exempt from a particular rule, might obtain an unfair advantage. Even if the concept were sound in theory, there is, as a practical matter, simply no reliable or consistent way to make that calculation. Given the almost infinite variety of physical attributes that make up individual athletes, the task of conducting an imaginary contest between one competitor and another, with each performing under different substantive rules, is beyond the capacity of even the most conscientious arbiter. Furthermore, this hypothetical contest, however well-conducted, is itself incompatible with the true nature of athletic competition: to compare *actual* (and necessarily unequal) results according to uniform rules. That test cannot be replicated in administrative or judicial proceedings.[25]

The problem is amply demonstrated in this case. While no one questions respondent's determination, it is simply guesswork whether his use of a cart gives him an advantage

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[24] These differences can be quite small. In 1998, for example, the difference in average score between the number one and number 100 PGA TOUR scoring leaders was 2.32 strokes per round. Reporter's Transcript at 780-81.

[25] Although the problem of inequality presumably could be avoided by eliminating a particular rule entirely, even the Ninth Circuit did not question that total elimination of the "walking rule" would fundamentally change the nature of the Tour events in which respondent seeks to participate. The requirement that competitors walk the course has been an integral part of the highest-level golf competitions from their beginning.

over other competitors at a Tour event. It would be hard enough to divine an answer to that question if all other golfers conformed to a single physical profile (for example, the "able-bodied competitor" posited by the courts below), but, in fact, different golfers are affected quite differently by the demands of walking a golf course during four or more rounds of a professional tournament. Even assuming that some fit, injury-free golfers might prefer to walk the course at all times—and would do so if the "walking rule" did not exist—other golfers at a Tour event may suffer from debilitating conditions (bad backs, sore knees and ankles, arthritic joints) that are made significantly worse by extensive walking. While these conditions are not disabling (as the term is defined in the Act), they may force golfers out of tournaments entirely or, at the very least, significantly increase the fatigue associated with walking the course. Does a player like respondent, who has a more serious condition but also a waiver from the "walking rule," have a competitive advantage over each of those players? In our view, it is simply not possible to know. Even if a court made a comparison with each golfer at each tournament on a case-by-case basis, there is no reason to be confident that the answers, whatever they were, would be correct.

We recognize that the proper interplay between the Act and competitive athletics is an issue that provokes differing views.[26] On the one hand, it is part and parcel of high-level competitive athletics that all competitors observe, and abide by, a uniform set of rules; on the other hand, it is endemic to the Act that

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[26] In addition to the division between the Seventh and Ninth Circuits on the issue presented here, various federal courts of appeals have grappled with the related, though not identical, question whether the Act compels waivers of various high-school athletic eligibility rules, ultimately reaching divergent conclusions on that question as well. *See, e.g., Sandison v. Michigan High Sch. Athletic Ass'n*, 64 F.3d 1026 (6th Cir. 1995); *Washington v. Indiana High Sch. Athletic Ass'n*, 181 F.3d 840 (7th Cir.), *cert. denied*, 120 S. Ct. 579 (1999); *Pottgen v. Missouri State High Sch. Activities Ass'n, supra.*

institutions may be called upon to change policies in order to accommodate disabled persons. But Congress was well aware that the broad goals of the Act would sometimes conflict with other important interests—*i.e.*, that there would be circumstances in which a proposed modification to some policy would "fundamentally alter" the nature of a particular good or service. For those cases, Congress specifically set forth how the conflict should be resolved: by its express terms, *see* 42 U.S.C. § 12182(b)(2)(A)(ii), the Act does *not* require the organization to make a fundamental change in the nature of its business. That principle is controlling here. It is essential to the nature of high-level Tour events that all competitors, without exception, play by the same rules, and the Ninth Circuit simply failed to grant that interest its proper statutory weight.

It is, to our knowledge, unprecedented for a federal court to order that a professional athlete be allowed to compete without adhering to the full set of substantive rules applicable to other competitors. Given the novelty and significance of this mandate, we believe it appropriate for this Court to grant certiorari in order to decide whether the Act does or does not impose that obligation on professional sports organizations. *See, e.g., National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459 (1999) (deciding issue of importance to administration of intercollegiate athletics); *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988) (same). The USGA and PGA TOUR, Inc., both of which operate nationwide,[27] sponsor most

[27] As a result of their nationwide presence, both organizations will be subject to suit in courts throughout the country, in addition to courts within the Seventh and Ninth Circuits. *See, e.g.*, note 15 *supra*. Until the issue is finally resolved, therefore, it appears likely that the question whether a disabled competitor is entitled to waiver of a substantive rule, or whether the Tour and USGA can apply their rules without exception, will continue to be decided on a "sometimes-yes, sometimes-no" basis, depending on the particular court. As the conflicting decisions of the Seventh and Ninth Circuits demonstrate, this system seems to serve neither the golfing organizations nor the individual golfers very well.

of the high-level men's professional golf tournaments in the United States, and it is important to them, to the golfers that compete in their tournaments, and to organizers and participants in other professional sports, to know whether the Act requires waivers of their substantive rules. We ask that this Court grant review to provide an authoritative answer.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

Nos. 98-35309, 98-35509.

CASEY MARTIN,
Plaintiff-Appellee,

v.

PGA TOUR INC., a Maryland corporation,
Defendant-Appellant.

Argued and Submitted May 4, 1999.
Decided March 6, 2000

Before: CANBY and T.G. NELSON, *Circuit Judges*, and FOGEL,[1] *District Judge*.

CANBY, *Circuit Judge*:

PGA Tour, Inc. ("PGA") appeals from the district court's decision in favor of Casey Martin, a disabled professional golfer, ordering PGA to make an exception to its "walking rule" to allow Martin to ride a golf cart during PGA competitions. We conclude that the Americans with Disabilities Act ("ADA") applies to PGA competitions and that allowing Martin to use a cart is a reasonable accommodation that does not fundamentally alter the nature of those events. We therefore affirm the district court's decision.

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[1] The Honorable Jeremy Fogel, United States District Judge for the Northern District of California, sitting by designation.

BACKGROUND

Casey Martin suffers from Klippel-Trenaunay-Weber Syndrome, a congenital, degenerative circulatory disorder that is manifested in a malformation of his right leg. This disorder causes Martin severe pain and atrophy in his lower leg, rendering him unable to walk for extended periods of time. The mere act of walking subjects him to a significant risk of fracture or hemorrhaging. There is no dispute that Martin is profoundly disabled.

PGA is a non-profit association of professional golfers.[2] It sponsors three competitive tours: (1) the PGA Tour, its most competitive tour, (2) the Nike Tour, one step down from the PGA Tour, and (3) the Senior PGA Tour, restricted to professional golfers age 50 and over. On days of tour competition, PGA is the operator of the golf course.[3]

The primary means of gaining entry to the PGA Tour and Nike Tour is by a competition known as the qualifying school. The best scorers in that competition qualify for the PGA Tour, and the next-best finishers qualify for the Nike Tour. Players in the Nike Tour may qualify for the PGA Tour by winning three Nike Tour tournaments in one year or by being in the top fifteen money- winners in the Nike Tour.

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[2] We refer hereafter to the defendant PGA Tour, Inc. as "PGA," in order to differentiate it from the PGA Tour, which is one of the three tours sponsored by PGA Tour, Inc.

[3] The term "operates," as it is used in the ADA, is extensive and "would include sublessees, management companies, and any other entity that owns, leases, leases to, or operates a place of public accommodation, even if the operation is only for a short time." 28 C.F.R. ch. I, pt. 36, app. B., at 628 (1999).

The qualifying school competition is conducted in three stages. In the first two stages, players are permitted to use golf carts. In the third stage, and in the PGA and Nike Tours themselves, players are required to walk as they play the course.[4] After qualifying for the third and final stage of the 1997 qualifying school, Martin requested permission from PGA to use a golf cart. PGA denied this request, and Martin sued.

The district court granted Martin a preliminary injunction and, using a golf cart, he performed well enough in the final stage of the qualifying school to earn a spot on the 1998 Nike Tour. The court subsequently granted Martin partial summary judgment, holding that PGA is subject to Title III of the ADA because it owns, operates and leases golf courses, which the ADA identifies as places of public accommodation.[5] *Martin v. PGA Tour, Inc.*, 984 F.Supp. 1320 (D.Or.1998). After a six-day bench trial, the district court concluded that modifying the walking rule for Martin was a reasonable accommodation that did not fundamentally alter the nature of PGA golf tournaments. *Martin v. PGA Tour, Inc.*, 994 F.Supp. 1242 (D.Or.1998). It accordingly entered a permanent injunction requiring PGA to permit Martin to use a golf cart in PGA and Nike Tour competitions in which he is eligible to participate, and in any qualifying rounds for those tours. PGA appeals.[6]

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[4] Players are permitted to use golf carts on the Senior Tour.

[5] The district court also ruled that PGA is not exempt from the ADA as a "private club," *see* 42 U.S.C. § 12187, because, among other reasons, it is a commercial enterprise offering athletic events to the public. *Martin*, 984 F.Supp. at 1326. PGA has not challenged that ruling on this appeal.

[6] The district court awarded Martin attorneys' fees and costs. PGA has protectively appealed that order; it does not contest the amount but seeks reversal of the award if it succeeds on appeal. Because we affirm on the merits, we also affirm the award of fees and costs to Martin as the prevailing party.

DISCUSSION

I. *Applicability of Title III (Public Accommodation)*

The district court granted Martin's motion for summary judgment, holding that, as a matter of law, Title III of the ADA applies to the PGA and Nike Tour competitions. We review de novo the district court's interpretation of the ADA. *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1246 (9th Cir.1999).

We begin our analysis, as did the district court, with the terms of the statute. The basic anti-discrimination clause of Title III of the ADA provides:

> No individual shall be discriminated against on the basis of disability in the full enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). The first issue for decision is whether Martin seeks to enjoy the facilities of a "place of public accommodation." The definition section of Title III of the ADA provides:

> The following private entities are considered public accommodations for purposes of this subchapter . . .
>
> * * * * *
>
> (L) a gymnasium, health spa, bowling alley, *golf course*, or other place of exercise or recreation.

42 U.S.C. § 12181(7)(L) (emphasis added). There is nothing ambiguous about this provision; golf courses are public accommodations. Indeed, PGA does not dispute that during one of its tournaments a golf course is a public accommodation with regard to the spectator areas; its contention is that the competitors' area "behind the ropes" is not a public accommodation because the public has no right

to enter it. Despite the surface plausibility of this argument, it too narrowly construes the nature of a public accommodation.

The district court held that a public accommodation could not be compartmentalized in the fashion PGA desired. At least in the present context, we agree. It is true that the general public cannot enter the area "inside the ropes," but competitors, caddies, and certain other personnel can. PGA contends that the restricted area is not being used as a "place of exercise or recreation," within the meaning of § 12181(7)(L), because the competitors are trying to win money, not exercise or recreate. Even if we were to agree with this point, it would not aid PGA. The statute also defines "public accommodation" to include a "theater, . . . stadium or other place of exhibition or entertainment." 42 U.S.C. § 12181(7)(C). If a golf course during a tournament is not a place of exercise or recreation, then it is a place of exhibition or entertainment. The statute does not restrict this definition to those portions of the place of exhibition that are open to the general public. The fact that entry to a part of a public accommodation may be limited does not deprive the facility of its character as a public accommodation. *See Independent Living Resources v. Oregon Arena Corp.*, 982 F.Supp. 698, 759 (D.Or.1997) (arena's executive suites contracted by businesses are public accommodations). Indeed, the underlying premise of the cases dealing with disabled student athletes is that Title III applies to the playing field, not just the stands. *See, e.g., Bowers v. National Collegiate Athletic Ass'n*, 9 F.Supp.2d 460, 483-90 (D.N.J.1998); *Tatum v. National Collegiate Athletic Ass'n*, 992 F.Supp. 1114, 1121 (E.D.Mo.1998); *Ganden v. National Collegiate Athletic Ass'n*, 1996 WL 680000, at *8-11 (N.D.Ill. Nov.21, 1996); *see also Anderson v. Little League Baseball, Inc.*, 794 F.Supp. 342, 344 (D.Ariz.1992) (undisputed that Title III applies to access to coaches' box on baseball field).

The Third Circuit dealt with a somewhat analogous problem in *Menkowitz v. Pottstown Memorial Medical Center*, 154 F.3d 113 (3d Cir.1998). There a physician with a disability sued a hospital under Title III after it denied him hospital staff privileges. The Third Circuit rejected the argument that Title III could be invoked only by the patients of a hospital, and held that denial of staff privileges qualified as a denial of "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation" prohibited by Title III, § 12182(a). *Id.* at 122. Staff privileges, of course, entail access to parts of the facility to which patients and the general public are denied entry.

In contending that it may compartmentalize golf courses during tournaments, PGA leans heavily on two examples set forth in the regulations. One is of a "mixed use facility," in the form of a large hotel that has a separate residential wing. *See* 28 C.F.R. ch. I, pt. 36, app. B, at 623 (1999). The non-public residential wing (which would be covered by the Fair Housing Act) is not a place of "public accommodation." *See id.* The hotel wing, however, would fall under 42 U.S.C. § 12181(7)(A) as an "inn, hotel, motel, or other place of lodging." 28 C.F.R. ch I, pt. 36, app. B, at 623; *see* 42 U.S.C. § 12181(7)(A). But in this example, the residential wing has never functioned as a hotel. A golf course during a tournament, however, is serving as a golf course.

The other example cited by PGA is that of a commercial facility, such as a factory, that allows public tours over specific routes at particular times. *See* 28 C.F.R. ch. I, pt. 36, app. B, at 624. The tour route is a public accommodation but the portions of the facility merely viewed from that route are not. *See id.* There are two reasons why this example is not persuasive. First, it applies to commercial facilities "not otherwise a place of public accommodation." *Id.* Second, the example would be analogous only if Martin were a spectator

seeking to use his golf cart within the competitors' area of a tournament.

This point brings us to the greatest difficulty with PGA's argument. It assumes that there is nothing public about the competition itself. According to PGA, the fact that its tournaments are restricted to the nation's best golfers means that the courses on which they play during tournaments cannot be places of public accommodation. But the fact that users of a facility are highly selected does not mean that the facility cannot be a public accommodation. For example, Title III includes in its definition "secondary, undergraduate, or postgraduate private school[s]." 42 U.S.C. § 12181(7)(J). The competition to enter the most elite private universities is intense, and a relatively select few are admitted. That fact clearly does not remove the universities from the statute's definition as places of public accommodation. It is true that the rest of the public is then excluded from the schools, but the students who are admitted are nevertheless members of the public using the universities as places of public accommodation.[7]

Competition to enter the select circle of PGA and Nike Tour golfers is comparable. Any member of the public who pays a $3000 entry fee and supplies two letters of recommendation may try out in the qualifying school. At the initial stage, it seems plain that the golf course on which the elimination begins is a place of public accommodation. As even PGA admits, "[t]he competition areas of some amateur

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[7] Title III does not restrict its coverage to members of the public; it provides that "No individual shall be discriminated against" in the enjoyment of public accommodations by reason of disability. 42 U.S.C. § 12182(a) (emphasis added). This provision does not, however, grant access to a place where the individual is not entitled to be; the rejected applicant for admission is not entitled to access to the university, and the spectator is not entitled to access to the tees, fairways and greens during a PGA golf tournament.

sporting events may well constitute places of public accommodation under Title III of the ADA when virtually any member of the public can participate." We fail to see, however, why a winnowing process would change the nature of the facility. If a stadium owner invited the public to compete in long distance races, and continued to run heats until only the ten best runners remained, the track would be no less a place of public accommodation when the final race was run. We see no justification in reason or in the statute to draw a line beyond which the performance of athletes becomes so excellent that a competition restricted to their level deprives its situs of the character of a public accommodation. Nor do we see any such justification for drawing a line between use of a place of public accommodation for pleasure and use in the pursuit of a living.

We conclude, therefore, that golf courses remain places of public accommodations while a PGA tournament is being conducted on them.

II. *Reasonable Modification (Accommodation)*

Title III further defines "discrimination" to include:

> a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications *would fundamentally alter the nature* of such goods, services, facilities, privileges, advantages or accommodations.

42 U.S.C. § 12182(b)(2)(A)(ii) (emphasis added).

Here, it is clear that permitting Martin to use a golf-cart is "reasonable" in the sense that it solves the problem of Martin's access to the competition. It is also "reasonable," as the district court found, in that golf-carts are used in other

competitions (such as those on the Senior Tour), and it is not a difficult practical matter to permit them. Use of a golf cart is also "necessary"; there was ample evidence to support the district court's finding that Martin could not walk the course, even with artificial aids. These matters are no longer in serious contention.

The issue on which most of the dispute centers is whether permitting Martin to use a golf cart will "fundamentally alter" the nature of the goods or service—the PGA or Nike Tour. It is readily apparent that walking is not essential to the generalized game of golf. Rule 1-1 of the Rules of Golf, promulgated by the United States Golf Association and the Royal and Ancient Golf Club of St. Andrews, Scotland, states:

> The Game of Golf consists in playing a ball from the teeing ground into the hole by a stroke or successive strokes in accordance with the Rules.

These Rules do not require players to walk. Indeed, PGA does not require players to walk in the early stages of the qualifying school or in the Senior Tour.

PGA correctly points out, however, that it is not offering the generalized game of golf in its PGA and Nike Tours, it is offering a particular competition. PGA provides, in the Conditions of Competition for its PGA and Nike Tours, that "[p]layers shall walk at all times during a stipulated round unless permitted to ride by the PGA TOUR Rules Committee." On occasions when the Committee has permitted players to ride, the waiver applies to all competitors, as when all players must be shuttled from the 9th green to the 10th tee when the distance is great. It also appears that, to save time, rides have been given from the fairway back to the tee to players who have lost a ball and must tee off again.

The issue for decision, then, is whether the accommodation of permitting Martin to use a golf cart fundamentally alters the PGA and Nike Tour competitions. That issue was fully tried in the district court.

The district court found that the purpose of requiring players to walk was to inject a fatigue factor into the shot-making of the game. *Martin*, 994 F.Supp. at 1250. It also found, however, that "the fatigue factor injected into the game of golf by walking the course cannot be deemed significant under normal circumstances." *Id.* It further found that, at the low levels of intensity of exercise involved in untimed walking of a golf course during a competition, "fatigue . . . is primarily a psychological phenomenon. . . . Stress and motivation are the key ingredients here." *Id.* at 1251. The court noted that, given the choice of carts or walking in other tours, large numbers of players chose to walk. *See id.* In the events in which PGA permits carts, it assigns no handicap penalty to those who ride as opposed to those who walk. *See id.* at 1248.

There was ample evidence to support all of these findings, and they are not clearly erroneous. Against this background, the district court evaluated whether use of a cart would give Martin an advantage over the other players who were required to walk. Even with a cart, Martin must walk about twenty-five percent of the course because the cart cannot be brought near to the ball in many cases. Martin endures significant pain while walking, and while getting in and out of his cart. The district court, after considering these factors, found that Martin "easily endures greater fatigue even with a cart than his able-bodied competitors do by walking." *Id.* at 1252.

In light of these findings, we conclude, as did the district court, that permitting Martin to use a golf court in PGA and Nike Tour competitions would not fundamentally alter the nature of those competitions. The central competition in

shot-making would be unaffected by Martin's accommodation. All that the cart does is permit Martin access to a type of competition in which he otherwise could not engage because of his disability.[8] That is precisely the purpose of the ADA. *See* 42 U.S.C. § 12101(a)(5) (discrimination against disabled includes "failure to make modifications to existing facilities and practices"); *Crowder v. Kitagawa*, 81 F.3d 1480, 1483 (9th Cir.1996) (Congress intended ADA to cover discriminatory impact of facially neutral barriers).

PGA argues that the kind of balancing engaged in by the district court and now by this court is wholly illegitimate. It agrees that some athletic rules, such as dress codes or uniform requirements, may be subject to exceptions to accommodate the disabled. But it contends that a rule intended to affect the competition cannot be made subject to exception. According to PGA, the case should have ended in its favor the moment the district court concluded that the purpose of PGA's walking-only rule was to inject the fatigue factor into the competition. Once that rule is determined to be "substantive," according to PGA, it is not subject to exceptions to accommodate disability.

The difficulty with this position is that it reads the word "fundamentally" out of the statutory language, which requires reasonable accommodation unless PGA can demonstrate that the accommodation would "fundamentally alter the nature" of its competition. 42 U.S.C. § 12182(b)(2)(A)(ii). PGA essentially argues that permitting a player to ride alters the competition and inquiry must stop there. It makes all alterations of the competition fundamental. But the statute

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[8] We note that the NCAA and Pac-10 rules of competition require players to walk and carry their own clubs. Martin applied for, and was granted, a waiver of that rule that permitted him to compete in college tournaments when he was a student.

mandates an inquiry into whether a particular exception to a rule would "fundamentally alter" the nature of the good or service being offered. The issue here is not whether use of carts generally would fundamentally alter the competition, but whether the use of a cart by Martin would do so. The evidence must "focus [ ] on the specifics of the plaintiff's or defendant's circumstances and not on the general nature of the accommodation." *Johnson v. Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1060 (5th Cir.1997). We cannot tell whether a golf cart for Martin fundamentally alters the competition without first investigating whether walking is fundamental to the competition. The mere fact that PGA has defined walking to be part of the competition cannot preclude inquiry, or PGA will have been able to define itself out of reach of the ADA. The district court, as we have said, found that the fatigue factor injected into the game by walking was not significant, and that finding was not clearly erroneous.

The nature of the district court's findings reflect the fact that whether an accommodation fundamentally alters a competition is an intensively fact-based inquiry. For that reason, we reject PGA's argument that permitting Martin to use a golf cart would open the door to future decisions requiring that disabled swimmers or runners be given a head start in a race, or that a growth-impaired basketball player be allowed to shoot 3-point baskets from inside the three-point line. We have little doubt that fact-based inquiries into the effects of such accommodations would result in rulings that those accommodations fundamentally altered the competitions. The same would be true if Martin were seeking to use a special golf ball that carried farther than others, or was seeking to play a shorter course than his competitors. Martin, however, seeks only to use a cart between shots, and the district court, after considering the evidence presented in a full trial, found that this accommodation does not fundamentally alter the competition.

PGA next contends that it was wholly improper for the district court to consider whether Martin's condition was such that riding would not give him an unfair advantage over competitors who walked. PGA has steadfastly declined to consider Martin's condition in adhering to its position that permitting him to use a cart would fundamentally change its competition. It contends that it would be far too burdensome for PGA to determine whether disabled individuals using carts would have an advantage over non-disabled walking competitors. PGA relies on *Sandison v. Michigan High Sch. Athletic Ass'n*, 64 F.3d 1026 (6th Cir.1995), which upheld an upper-age limit for high school athletes. *Sandison* rejected an argument that over-age would not provide a competitive advantage for the learning-disabled plaintiffs because they were of only average athletic ability; it stated that "[i]t is plainly an undue burden to require high school coaches and hired physicians to determine whether [various] factors render a student's age an unfair competitive advantage." *Id.* at 1035; *see also McPherson v. Michigan High Sch. Athletic Ass'n*, 119 F.3d 453, 462 (6th Cir.1997) (upholding maximum eight-semester eligibility rule on same grounds); *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 931 (8th Cir.1994) (same).

The foundation of these cases, however, was a finding, or evidence compelling a finding, that the rule against older or more experienced high- school athletes was necessary to protect the competition in the lower age group, and to prevent "red-shirting" of athletes to permit them to compete when older and more experienced than the others. *See Sandison*, 64 F.3d at 1035; *McPherson*, 119 F.3d at 462; *Pottgen*, 40 F.3d at 931 & n. 6. The record in this case is quite different; the district court found that the fatigue factor introduced by walking was not significant.[9]

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[9] This finding also distinguishes Martin's case from *Olinger v. United States Golf Ass'n*, 55 F.Supp.2d 926 (N.D.Ind.1999), in which the district

Moreover, we do not share the antagonism to individual determinations reflected in these cases. "We prefer the approach of Judge Richard Arnold, dissenting in *Pottgen*, that the inquiry must focus on the individual exception and that, in light of the plaintiff's individual characteristics as found by the district court, the age requirement could be modified for this individual player without doing violence to the admittedly salutary purposes underlying the age rule." *Pottgen*, 40 F.3d at 932 (dissenting opinion). The Seventh Circuit adopted such an approach in *Washington v. Indiana High Sch. Athletic Ass'n*, 181 F.3d 840 (7th Cir.), *cert. denied*, — U.S. —, 120 S.Ct. 579, 145 L.Ed.2d 482 (1999), in enjoining enforcement of an eight- semester rule against a learning-disabled student. It observed that applying the eight-semester rule to exclude the particular plaintiff would not "add anything to the protections provided by the IHSAA's age limit rule, which generally limits the size, strength and athletic maturity of student athletes." *Id.* at 852. The court continued:

> Nor will the record support the argument that a waiver of the rule in Mr. Washington's case would place an undue administrative or financial burden on the IHSAA. The record indicates that Mr. Washington is the only student athlete to seek a waiver because of a learning disability in more than a decade. The few case-by-case analyses that the IHSAA would need to conduct hardly can be described as an excessive burden.

Id. Much the same can be said here. Nothing in the record establishes that an individualized determination would impose an intolerable burden on PGA. Although PGA refused

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court found on the evidence there presented that use of a cart can provide a golfer with a competitive advantage over a golfer who walks. *See id.* at 935. To the extent that other rulings in *Olinger* are inconsistent with our decision today, we respectfully disagree with it.

to consider the effect of Martin's disability, the district court appeared to have little difficulty making the factual determination that providing Martin with a golf cart would not give him an unfair advantage over his competitors. We conclude that, under the ADA, that determination was a proper one for the court to make. *See Johnson*, 116 F.3d at 1059-60 (fundamental alteration defense focuses on individual circumstances).

CONCLUSION

We conclude that, under Title III of the ADA, a golf course is a place of public accommodation while PGA is conducting a tournament there. We also conclude that the district court did not err in determining that the provision of a golf cart to Martin was a reasonable accommodation to his disability, and that use of the cart by Martin did not fundamentally alter the nature of the PGA and Nike Tour tournaments. We accordingly affirm the judgment of the district court.[10]

AFFIRMED.

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[10] Our ruling that Martin is entitled to relief under § 12182(a) of Title III makes it unnecessary to address his alternative arguments.

UNITED STATES DISTRICT COURT,
D. OREGON.

No. 97-6309-TC.

CASEY MARTIN,

Plaintiff,

v.

PGA TOUR, INC., a Maryland Corporation,

Defendant.

Feb. 19, 1998

FINDINGS OF FACT AND CONCLUSIONS OF LAW

COFFIN, United States Magistrate Judge.

This case presents profound questions regarding the application of the Americans with Disabilities Act (ADA). Does the ADA apply to athletic events or sports organizations? If so, are the most elite events and organizations, such as those at the professional level, somehow exempt from coverage? If the ADA is applicable, may a rule of competition be modified to accommodate a disabled competitor, or are the rules untouchable because any alteration of any rule would fundamentally alter the nature of the competitions?

Casey Martin is a disabled professional golfer. He can do everything well in the game of golf except walk to and from his shots. Because of a congenital deformity, his right leg is severely atrophied and weakened. He is placed at significant risk of fracturing his tibia by the simple act of walking, because of the increasing loss of bone stock and weakening of this bone that has occurred over the lifetime of this disorder. According to the medical testimony, walking also places

Martin at significant risk of hemorrhaging as well, and creates an increased chance of developing deep venous thrombosis (blood clots).

The condition plaintiff suffers from causes him severe pain and discomfort. The slightest touching of his right leg at or below the knee is extremely painful. Beyond this, the condition causes him pain while playing golf, pain while carrying on daily activities and pain even while he is at rest.

A video of plaintiff's condition introduced into evidence at the trial, provides compelling evidence of the nature and extent of his disability[1]: The right leg appears to be about half the size of plaintiff's left leg. When plaintiff removes his double set of support stockings and stands upright, the leg immediately discolors and swells in size because the circulatory condition with which he is afflicted prevents the blood from flowing through his veins back to the heart. Instead, gravity, combined with "incompetent" valves which fail to close properly, pulls the blood back down his leg. The leg becomes engorged in blood because the arteries pump blood to his leg but the veins fail to circulate blood back to the heart. To relieve this situation, plaintiff must lie down and elevate the leg.

A double set of support or compression stockings provides plaintiff with enough venous pressure to allow him to remain

[1] Defendant PGA Tour objected to the introduction of the video on grounds of relevance and hearsay. The objection as to relevance was based on the PGA's position that it conceded Martin has a disability and this evidence on that issue was unnecessary. However, as I will explain more fully *infra*, I disagree with the PGA's contention that an individualized assessment of Casey Martin's disability is irrelevant to the outcome of this case. Consideration of the nature and extent of plaintiff's disability is critical to determining whether use of a cart affords him a reasonable accommodation under the circumstances presented. The hearsay objection concerned certain audio portions of the tape, which portions were stricken from the record.

upright for periods of time. As he has gotten older (he is now 25 years of age), his leg has steadily worsened because of his disability. Whereas he used to be able to walk a golf course (albeit with difficulty), he can no longer do so. As noted, he is at substantial risk of serious physical harm by the mere act of walking.

Dr. Donald Jones, plaintiff's treating physician, counsels that it is medically necessary for Casey Martin to be permitted a cart it [sic] he is to play the game of golf. As he summarized plaintiff's condition:

> [T]he medical records reflect a 25-year old male with a rare congenital vascular malformation of the right lower extremity which has led to, number one, chronic pain secondary to vascular engorgement and progressive loss of bone stock, pain so severe that he has at least considered to explore the use of time contingent narcotics; number two, a documented sleep disorder secondary to chronic pain which leads, according to Dr. Holmes, to an exhaustion syndrome; number three, the need to wear two compression stockings at all times; number four, it has resulted in marked muscular atrophy and weakness in his right calf; number five, it has affected his knee through multiple intra-articular bleeds, causing abnormalities which are painful; and number six, and most important from the orthopedic aspect, it has resulted in a weakened tibia which is at risk for fracture and potential limb loss and/or serious post-fracture complications.

Transcript (#) at pp. 99-100.

Defendant PGA Tour does not contest that plaintiff has a disability within the meaning of the ADA, nor does it contest that his disability prevents him from walking the course during a round of golf. However, prior to this trial, defendant did not review plaintiff's medical records nor view the

videotaped presentation of his condition. The PGA's position in this case has been twofold:

First, it asserts that the ADA does not apply to its professional golf tournaments; and

Second, the PGA asserts that the requirement of walking is a substantive rule of its competition and that a waiver of the rule would, accordingly, result in a fundamental alteration of its competitions, which the ADA does not require.

The first defense raised by the PGA—that the ADA is inapplicable to its tournaments—has been extensively discussed in this court's order dated January 30, 1998(# 69), wherein I found that the PGA Tour was not exempt, as a "private club," from ADA coverage and also found that its tournaments were conducted at places—i.e., golf courses—that were specifically included within the definition of places of "public accommodation" subject to the ADA.

The second defense encompasses the concept that the ADA does not require a covered entity to work a fundamental alteration of the nature of its business or programs in order to accommodate the disabled, nor need the entity accommodate if to do so would result in an undue hardship to the entity.

A few examples suffice to illustrate this point: Suppose a bookstore normally does not stock books in braille. A blind customer demands the accommodation of a supply of such books. The bookstore need not comply with the request, as such an accommodation would fundamentally alter the nature of its business. *See* 28 C.F.R. Ch. 1 Pt. 36, App. B at p. 632 (July 1, 1997 edition).[2] Or, to use another example cited by

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[2] If the disabled person were an employee of the bookstore, however, and required a braille-encoded computer to perform her tasks, a different analysis would be applied and the question would be whether the accommodation would be an undue hardship (e.g., too great a financial burden) on the employer. *See* 42 U.S.C. §§ 12112(b)(5)(A), 12111(10). Because I find that Casey Martin is not an employee of the PGA Tour

the PGA, a day care center normally does not provide individualized care (*i.e.*, one attendant for each child) to its customers. A disabled child, in need of individualized attention, requests such an accommodation. The day care center need not comply because such would fundamentally alter the nature of the service the center provides.

There are few reported cases wherein the ADA has been applied to sports programs:

The Sixth Circuit Court of Appeals applied the ADA to the Michigan High School Athletic Association on two separate occasions regarding eligibility requirements. In *McPherson v. MHSAA*, 119 F.3d 453 (6th Cir.1997) the court considered whether the MHSAA's eight semester rule[3] violated the ADA when applied to a student with a learning disability which prevented him from completing high school in eight semesters. The court initially noted that the simple fact that the MHSAA labeled the rule necessary did not make it so, but that the court had an independent responsibility to determine whether the rule is in fact necessary. *Id.* at 461. The court determined the rule was necessary.[4] The court then found that requiring the MHSAA to waive the rule would work a fundamental alteration in its sports programs and would impose an immense financial and administrative burden on

(infra). I focus only on the issue of whether he is entitled to his requested accommodation (the use of a golf cart) as an independent contractor playing in defendant's tournaments which are held at places of public accommodation.

[3] The MHSAA's eight semester rule provided that any student who has completed eight semesters of high school is ineligible for interscholastic sports competition.

[4] The purpose of the rule was to limit the level of athletic experience and range of skills of the players in order to create a more even playing field for the competitors, to limit the size and physical maturity of high school athletes for the safety of all participants, and to afford the players who observe the rule a fair opportunity to compete for playing time.

the MHSAA by forcing it to make "near impossible determinations" about a particular student's physical and athletic maturity.

Two years prior the court similarly found that waiver of an age regulation in high school sports fundamentally altered the program. *See Sandison v. MHSAA*, 64 F.3d 1026 (6th Cir.1995). The court noted, as it did in *McPherson*, that individually determining whether each older student possessed an unfair competitive advantage was not a reasonable accommodation. *Id.* at 1037.

The Eighth Circuit was confronted with a similar age eligibility rule of the Missouri State High School Athletic Association. *See Pottgen v. MSHSAA*, 40 F.3d 926 (8th Cir.1994). In *Pottgen* the court found that the age requirement was essential to the high school athletic program and that an individualized inquiry into the necessity of the requirement in the plaintiff's case was inappropriate. *Id.* at 930.[5]

The District Court for the District of New Jersey found that complete abandonment of the "core course" requirement would fundamentally alter the nature of NCAA athletic programs. *Bowers v. National Collegiate Athletic Assoc.*, 974 F.Supp. 459 (D.N.J.1997). The *Bowers* court found the "core course" requirement essential because it was reasonably necessary to accomplish the purpose of the NCAA program. However, the court also noted that the rule authorized waiver

[5] Plaintiff cites two district court cases in which an individualized inquiry was conducted to determine whether waiving the age rule for the individual plaintiffs would undermine the purpose of the rule, but each was vacated as moot. *See Johnson v. Florida High School Activities Assoc.*, 899 F.Supp. 579 (M.D.Fla.1995), *vacated as moot* 102 F.3d 1172 (11th Cir.1997); *Dennin v. Conn. Interscholastic Athletic Conference*, 913 F.Supp. 663 (D.Conn.1996), *vacated as moot* 94 F.3d 96 (2nd Cir.1996).

of the requirement on a case-by-case basis for individualized consideration and as such was adequate to reasonably accommodate students with learning disabilities. *Id.* at 467.

From this rather limited background of athletic ADA case law, the PGA asserts that the court should focus on whether an athletic rule is "substantive"—*i.e.*, a rule which defines who is eligible to compete or a rule which governs how the game is played. If it is, according to the PGA's argument, the rule cannot be modified without working a fundamental alteration of the competition, and the ADA consequently does not require any modification to accommodate the disabled.

I note, however, that even in those cases most heavily relied upon by the PGA the courts examined the purpose of each of the rules in question to determine if the requested modification was reasonable.

In *Sandison* and *McPherson*, the eligibility requirements imposed were closely fitted with the purpose of high school athletics—to allow students of the same age group to compete against each other. The learning-disabled plaintiffs who had passed beyond the age or semester limits while still remaining in high school could not compete without fundamentally altering the nature of the services at issue. That the plaintiffs in those cases may have been less skilled athletes than their peers missed the point. High school athletics are for youths of a certain age group (14-18). Eliminating the curriculum or age-eligibility requirements for high school athletes clearly changes the fundamental nature of such competition.

Similarly, in *Bowers*, the issue was the "core course" requirement for student-athletes at the collegiate level. An athlete had to be a qualified student to compete. A complete waiver of the academic requirement would obviously alter the fundamental nature of the program, and, as noted, individual assessments and exemptions were permitted.

That is not to say that athletic associations have unfettered discretion to set eligibility requirements as they see fit. May a high school athletic association expressly define eligibility requirements so as to exclude the learning or other disabled? If it did, would the courts simply be left to conclude that any change in such a rule would fundamentally alter the rules of competition and by virtue of such be unreasonable? For example, may a high school league promulgate a rule prohibiting competitors from using corrective lenses to assist their vision at athletic events—and be immune from ADA scrutiny because an accommodation to the sight-impaired would fundamentally alter a rule of competition?

Essentially, then, the PGA Tour's contention that it alone may set the rules of competition, and that any modification of any of its rules (which may be necessary to accommodate the disabled) fundamentally alters the nature of PGA tournaments, is simply another version of its argument that the PGA Tour is exempt from the provisions of the ADA. It is not. The court has the independent duty to inquire into the purpose of the rule at issue, and to ascertain whether there can be a reasonable modification made to accommodate plaintiff without frustrating the purpose of the rule, and without altering the fundamental nature of PGA Tour competition.

Although the PGA Tour is a professional sports organization and professional sports enjoys certainly, a much higher profile and display of skills than collegiate or other lower levels of competitive sports, the analysis of the issues does not change from one level to the next. High school athletic associations have just as much interest in the equal application of their rules and the integrity of their games as do professionals. Put differently, if it is unreasonable to accommodate Casey Martin's disability with a cart at the PGA Tour level because of its rules of competition, it is equally unreasonable to so accommodate a similarly disabled

golfer at the high school level if the same rules were applicable.

It is also worth noting that the ADA does not distinguish between sports organizations and other entities when it comes to applying the ADA to a specific situation. Businesses and schools have rules governing their operations which are of equal importance (in their sphere) as the rules of sporting events. Conversely, the disabled have just as much interest in being free from discrimination in the athletic world as they do in other aspects of everyday life. The key questions are the same: does the ADA apply, and may a reasonable modification be made to accommodate a disabled individual?

An example from a prior case filing illustrates the tension that exists between the disabled seeking equal access and an entity that must modify its rules or practices to accommodate: A man afflicted with cerebral palsy books an international flight on a commercial airline from Oregon to Germany. The first leg of the flight takes the disabled individual from Eugene, Oregon to Chicago, Illinois, where he changes planes for the next leg of the trip. The captain of the airlines for the international leg, however, decides that the individual's condition (which hasn't changed since the first flight) renders him unfit to travel safely, and so he orders him off the plane. This unfortunate person's journey is interrupted solely because of his disability, and he is relegated to languish in a hotel room (away from his home and away from his destination) until a captain can be found who is willing to admit him as a passenger.[6]

The rule at stake in the above example is the age-old rule that the captain is in charge of the ship. This rule has an obvious and important substantive purpose. Nonetheless, are the disabled not entitled to travel to their destinations with the

[6] *See* Civil Number 93-6068-TC.

same degree of reliance on their arrangements as the able-bodied? Put differently, doesn't the ADA (or its counterpart, the Rehabilitation Act) require the airlines to modify the rule to provide a reasonable accommodation—i.e., a flight there and back without interruption by an uncomfortable captain—under the specific circumstances of his case, even though such might modify a substantive rule of its operation?

It is with these concepts in mind that I approach Casey Martin's request for an accommodation.

First, I set forth (and perhaps restate to some extent), a general overview of the ADA. As I reject (without detailed elaboration[7]) plaintiff's claims that he is a PGA Tour employee and that the Nike Tour is a "course or examination" under the Act, I will discuss only his remaining claim, *i.e.*, the "public accommodation claim" under Title III of the Act.

Title III of the ADA provides:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.
>
> . . . .
>
> discrimination includes failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of the good, service, facility, privilege, advantage, or

[7] For the most part, I agree with, and incorporate by reference, the argument set forth by defendant in its memorandum in support of summary judgment regarding the employee, and course and exam issues. *See* Defendant's Memo (# 21).

accommodation being offered or would result in an undue burden.

. . . .

discrimination also includes the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered.

42 U.S.C. §§ 12182(a), 12182(b)(2)(A)(i) and (ii)

The ADA was enacted by Congress in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Congress found that "individuals with disabilities continually encounter various forms of discrimination, including . . . failure to make modifications to existing facilities and practices. . . ." Congress intended to protect disabled persons not just from intentional discrimination but also from "thoughtlessness," "indifference," and "benign neglect." *See Crowder v. Kitagawa*, 81 F.3d 1480, 1483-1484 (9th Cir.1996).

ADA defines disability with respect to an individual as:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12102(2).

The phrase physical or mental impairment means:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

28 C.F.R. § 36.104(1).

The phrase major life activity means:

functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

28 C.F.R. § 36.104(2).

The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

1. the nature and severity of the impairment;

2. the duration or expected of the impairment; and

3. the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j)(2).8 [FN8]

Temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually

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[8] The regulations concerning temporary impairments are found in the section concerning Title I (employment) of the ADA, but are useful in determining whether a disability exists under Title III.

not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, etc. *Sanders v. Arneson Products*, 91 F.3d 1351, 1354 (9th Cir.1996). Temporary injury with minimal residual effects cannot be the basis for a sustainable claim under the ADA. *Id.*

Plaintiff has the burden of demonstrating that he is disabled and has done so. Plaintiff also has the burden of proving that a modification was requested and that the requested modification is reasonable. "Plaintiff meets this burden by introducing evidence that the requested modification is reasonable in the general sense, that is, in the general run of the cases." *Johnson v. Gambrinus Co.*, 116 F.3d 1052, 1059 (5th Cir.1997). With respect to this element, the use of a cart is certainly not unreasonable in the game of golf. As noted hereafter, the Rules of Golf do not require walking, and even the PGA Tour permits cart use at two of the four types of tournaments it stages.[9] While the PGA Tour permits cart use at those two events, it imposes no handicap system or stroke penalties on those who opt for carts as opposed to those who elect to walk. This is certainly compelling evidence that even the PGA Tour does not consider walking to be a significant contributor to the skill of shot-making. In addition, the NCAA and PAC 10 athletic conference permit the use of carts as an accommodation to disabled collegiate golfers. Under the Johnson analysis such evidence meets plaintiff's burden of demonstrating that a cart is a reasonable

[9] The PGA Tour stages the PGA Tour, senior PGA Tour, the Nike Tour, and the Qualifying School Tournament. The Senior Tour is for PGA Tour golfers of 50+ years in age. The Qualifying School Tournament screens those who are competing for entry into the PGA Tour and Nike Tour. The PGA Tour admits the most skilled golfers; the Nike Tour admits those at the next highest level. The PGA Tour allows cart use on the Senior PGA Tour and in the two preliminary rounds of the Qualifying School Tournament.

modification to accommodate his disability in the game of golf in the general sense, that is in the general run of cases.

Defendant then must make the requested modification unless it meets its burden of proving that the requested modification would fundamentally alter the nature of its public accommodation. "The type of evidence that satisfies this burden focuses on the specifics of the plaintiff's or defendant's circumstances and not on the general nature of the accommodation." Id. Defendant argues that an individualized inquiry into the necessity of the walking rule in Casey Martin's case is not appropriate. *See e.g., Pottgen*, 40 F.3d at 930-31. However, Johnson suggests otherwise. An individualized assessment finds support in the Ninth Circuit as well. *See Crowder*, 81 F.3d at 1486 ("the determination of what constitutes reasonable modification is highly fact-specific, requiring case-by-case inquiry"); *see also Stillwell v. Kansas City, Missouri Bd. of Police Commissioners*, 872 F.Supp. 682, 687 (W.D.Mo.1995) (individualized assessment necessary to determine if plaintiff can meet the purpose of defendant's rule). Thus, the ultimate question in this case is whether allowing plaintiff, given his individual circumstances, the requested modification would fundamentally alter PGA and Nike Tour golf competitions.[10]

The Rules of Golf

The general "Rules of Golf" are promulgated by the United States Golf Association (USGA) and the Royal and Ancient Golf Club of St. Andrews, Scotland (R & A).

[10] At this stage of the analysis, I agree with the PGA that only the nature of PGA and Nike Tour golf may be considered in determining whether the requested modification would cause a fundamental alteration. However, as noted, I do not agree with defendant's position that this analysis is to be undertaken without an individualized assessment of Casey Martin's disability.

Rule 1-1 provides as follows:

> The Game of Golf consists in playing a ball from the teeing ground into the hole by a stroke or successive strokes in accordance with the rules.

Nothing in the Rules of Golf requires or defines walking as part of the game. In its reported Decisions on the Rules of Golf regarding the Rules of Golf, the USGA has expressed that it is permissible to ride a cart in golf unless such is prohibited by the local rules defining the conditions of competition for particular events. In Appendix I to the Rules of Golf we find:

> Transportation
>
> If it is desired to require players to walk in a competition, the following condition is suggested:
>
> Players shall walk at all times during a stipulated round.

The PGA Tour promulgates a pamphlet entitled "Conditions of Competition and Local Rules" which govern PGA Tour and Nike Tour tournaments. The preamble to this document provides, in pertinent part, as follows:

> The Rules of the United States Golf Association govern play, as modified by the PGA Tour.
>
> One of those modifications appears in Section A--Conditions of Competition:
>
> ¶ 6 *Transportation--Appendix I*
>
> Players shall walk at all times during a stipulated round unless permitted to ride by the PGA Tour Rules Committee.

No written policy has been cited by either party which governs the Rules Committee in its exercise of discretion regarding a waiver of the walking requirement. On the occasions when the walking rule has been waived, it has been

waived for all competitors (e.g., to shuttle players from the 9th green to the 10th tee where considerable distance is involved). No waiver has ever been granted for individualized circumstances (such as disability).

Prior to requesting use of a cart as an accommodation for his disability, plaintiff explored the possibility of various artificial aids to walking. I allow Dr. Jones to describe what those were, and why they won't work:

> By August 1996 at the age of 24, Casey reported to me that he was having tremendous difficulty with ambulation. He was having great difficulty walking 18 holes of golf. He was not only having trouble with the golf, but was also now having significant discomfort with the requirements of daily living. At this point I immobilized his leg in a removable brace and started a physical therapy program. Neither was beneficial.
>
> By now Casey was becoming extremely frustrated, so I decided to accompany him during a number of rounds during the summer of 1996.
>
> Q. You are talking about rounds of golf?
>
> A. Rounds of golf.
>
> Q. Okay.
>
> A. In hopes that I could observe some characteristics of his gait that would allow me to provide him with some form of stabilizing device. During this time, we tried in—shoe orthosis; that is, shoe inserts, which were of minimal benefit.
>
> Q. What were they intended to do?
>
> A. They will stabilize the hindfoot, and there's a biomechanical region whereas if you stabilize the hindfoot, the tibia doesn't rotate with the gait and will hopefully decrease the pain.

Q. The right leg is slightly longer also?

A. Yes.

Q. Okay. And that right leg being longer, is due to this condition?

A. Yes.

Q. Okay. All right. What was next?

A. We also placed him into ankle-foot orthosis. Now, that's a plastic brace that extended from the toes to the mid-calf and is for the purpose of stabilizing his hindfoot and, also, protecting his tibia. Casey found that it was virtually impossible to golf in this device because it limited his hindfoot motion as well as the fact that it caused considerable discomfort over his calf which is very sensitive. It was during this time that I became increasingly concerned about the well being of Casey's lower extremity. I can recall playing two rounds of Golf with Casey where he was unable to finish the 18 holes while walking. I also recall this summer one round of golf where we used a golf cart. The ground was moderately wet and unstable. We could not park as close to the tee box or to the green as we normally would. As a result, Casey, had to stop his round at about the 14th hole because he was having difficulty just getting to the tee box and green.

Transcript (#) at pp. 88-90.

Thus, Casey Martin cannot walk the course, and only a cart will permit him to compete on the Nike Tour. As with the disabled airline passenger, he finds himself in conflict with a substantive rule of operation.

According to the PGA Tour, the purpose of the walking rule is to inject the element of fatigue into the skill of shot-making. I accept that assertion and expressly find from the

evidence produced at trial that such is a cognizable purpose[11] of the rule from the standpoint of the ADA.

The question thus is—may the walking rule be modified to accommodate Casey Martin without fundamentally altering the nature of the game being played at the PEA Tour's tournaments?

In answering the question, as noted previously, I reject the defendant's contention that the plaintiff's individual circumstances are irrelevant to the inquiry. *See Johnson, Crowder, Stillwell*, cited *supra* p. 1249.

Furthermore, the fatigue factor injected into the game of golf by walking the course cannot be deemed significant under normal circumstances. Dr. Gary Klug, a professor in physiology at the University of Oregon, and an expert on the physiological basis for fatigue, calculates that approximately 500 calories are expended in walking a course of golf (approximately 5 miles of walking in a 5 hour time period). He describes the energy expenditure as follows: "nutritionally it's less than a Big Mac." He further notes that these calories are expended over a 5 hour period, and that the golfers have numerous intervals of rest and opportunities for refreshment (or calorie replacement).

While the PGA Tour cited Ken Venturi's memorable 1964 U.S. Open win in which he overcame severe and near-fatal exhaustion as he finished the course in high heat and humidity, Dr. Klug indicates that Mr. Venturi's fatigue was induced by heat exhaustion and fluid loss—not walking. According to Dr. Klug, tests have disclosed that fatigue from exercise—as measured by oxygen consumption—is not significantly influenced by heat or humidity. Rather, dehydration is the critical factor in such situations. Many

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[11] Mere tradition would not be a cognizable purpose—i.e., one entitled to any weight.

spectators at the 1964 U.S. Open had to be treated for exhaustion as well, and they were not walking.

Furthermore, fatigue at lower intensity exercise[12] is primarily a psychological phenomenon, according to Dr. Klug. Stress and motivation are the key ingredients here. Place an individual in the middle of the Los Angeles freeway at rush hour, and he will get fatigued in a hurry without moving a muscle. If someone pedals a bicycle for 30 minutes and says "I've had it," but is promised $1,000 if he goes another 5 minutes, his fatigue may well disappear.

Every individual differs in their psychological fatigue components, but walking has little to do with such components. If anything, from the evidence introduced at trial, most PGA Tour golfers appear to prefer walking as a way of dealing with the psychological factors of fatigue.[13]

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[12] Walking 5 miles in 5 hours cannot be equated with high intensity exercise. A requirement of running, or even walking, 5 miles at a continuous gait would certainly induce more fatigue from the physiological standpoint, but that is not what the PGA Tour requires. To quote from Nike Tour golfer Eric Johnson: _

Q. does [walking] create any problem for you?

A. Not more than the temperature outside would cause a person to sweat just standing there or cause a person to be very cold just standing there. There are--there are cases and instances where we play golf courses that are hilly where you might have to walk up a hill, and you would be more exerted when you get to the top of the hill than if you were walking a flat surface or downhill. But because of the pace of play and our preshot routines, we know to not to hit when we are winded or we know not to hit until we are ready to hit the golf ball. So I can't think of a time in my golfing career where I've ever hit a golf shot where I've felt that I wasn't ready to hit.

Transcript (#) at p. 33.

[13] As Nike Tour pro Eric Johnson described when asked why he preferred to walk:

When given the option of cart-riding or walking—such as at the Senior PGA Tour or PGA Tour Qualifying Tournament--the vast majority have opted to walk. Why would this be if walking truly fatigued them so that they hit worse shots than if they ride? As the saying goes, "the proof of the pudding is in the eating."

And then we come to Casey Martin's unique circumstances. If the majority of able-bodied elect to walk in "carts optional" tournaments, how can anyone perceive that plaintiff has a competitive advantage by using a cart given his condition?

The fatigue plaintiff endures just from coping with his disability is undeniably greater than the fatigue injected into tournament play on the able- bodied by the requirement that they walk from shot to shot. Walking at a slow pace[14]—to

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I prefer to walk, probably for a number of reasons. One, it's how I've played golf most of my life, and it keeps me in rhythm. There are times when I would prefer to walk because the temperature outside is such that if you are in the golf cart, the wind chill factor drops when you are riding in it and you are too cold. Weather's a real large contributing factor in walking. I would much rather walk if it was raining because I am able to stay under my umbrella and not get as wet, my equipment stays dry, those types of things.

Q. All right. Are you better able to get the feel of the course when you walk as opposed to ride, or do you know?

A. You get a full effect of the elements. Everything from changes in wind direction from one part of the fairway to the other, to being able to watch what the flag stick's doing on the green, to walking down the fairway versus being in the golf cart trying not to run somebody over.

Transcript (#) at p. 17.

[14] The PGA Tour does not require golfers to walk rapidly to their next shot. There do not appear to be any time limits on getting to the ball, although a golfer has 5 minutes to find a lost ball. Once at the ball, a golfer has 40 seconds to hit it. If a golfer is closest to the hole, he has additional time to rest while the other members of his group hit their shots.

the able-bodied—is a natural act, of little more difficulty than breathing. It is how we were designed to move from place to place.

Walking for Casey Martin is a different story.

In the first place, he does walk while on the course—even with a cart, he must move from cart to shot and back to the cart. In essence, he still must walk approximately 25% of the course. On a course roughly five miles in length, Martin will walk 1 1/4 miles.

The plaintiff is in significant pain when he walks, and even when he is getting in and out of the cart. With each step, he is at a risk of fracturing his tibia and hemorrhaging. The other golfers have to endure the psychological stress of competition as part of their fatigue; Martin has the same stress plus the added stress of pain and risk of serious injury. As he put it, he would gladly trade the cart for a good leg. To perceive that the cart puts him—with his condition—at a competitive advantage is a gross distortion of reality.

As plaintiff easily endures greater fatigue even with a cart than his able- bodied competitors do by walking, it does not fundamentally alter the nature of the PGA Tour's game to accommodate him with a cart.

It lends emphasis to the point that the walking rule may be modified without fundamentally altering the PGA's game to consider several other PGA rules in a hypothetical context.

Rule 6-4 of the Rules of Golf specifies:

Caddie

The player may have only one caddie at any one time, under penalty of disqualification.

Rule 8 provides:

Advice; Indicating Line of Play

Definitions

"Advice" is any counsel or suggestion which could influence a player in determining his play, the choice of a club or the method of making a stroke.

Information on the Rules or on matters of public information, such as the position of hazards or the flagstick on the putting green, is not advice.

The "line of play" is the direction which the player wishes his ball to take after a stroke, plus a reasonable distance on either side of the intended direction. The line of play extends vertically upwards from the ground, but does not extend beyond the hole.

And Rule 8-1 states:

Advice

During a stipulated round, a player shall not give advice to anyone in the competition except his partner. A player may ask for advice during a stipulated round from only his partner or either of their caddies.

May these be modified to accommodate a disabled golfer--e.g., a blind golfer?

Interestingly, the USGA promulgates a pamphlet entitled *A Modification of the Rules of Golf for Golfers with Disabilities*. The Preface to the Pamphlet reads:

> This publication contains permissible modifications to the Rules of Golf for use by disabled golfers. This is not intended to be a revision of the Rules of Golf as they apply to able-bodied players. As is the case for the Rules of Golf themselves, these modifications, along with the philosophy expressed herein, have been agreed upon by the United States Golf Association and the Royal and Ancient Golf Club of St. Andrews, Scotland.

Under the category of Blind Golfers, the pamphlet provides:

Definition of "Coach"

The status of the coach and the duties which he may perform should be defined clearly. Without such clarification, it would be difficult, for example, to determine how a blind golfer must proceed if his ball were to strike his or another player's coach after a stroke. Therefore, the following definition is recommended:

> Coach
>
> A "coach" is one who assists a blind golfer in addressing the ball and with the alignment prior to the stroke. A coach has the same status under the rules as a caddie.
>
> Note: A player may ask for and receive advice from his coach.

And the Caddie and Advice rules are modified as follows:

Rule 6-4 (Caddie)

There is nothing in the rules which would prohibit the coach of a blind golfer from functioning as his caddie. For a variety of reasons, however, a coach may not be able to perform the duties of a caddie. Therefore, it is permissible for a blind golfer to have both a coach and a caddie. In such circumstances, however, the coach may not carry or handle the player's clubs except in helping the player take his stance or him as permitted by analogy to Decision 6-4/4.5. Otherwise, the player would be subject to disqualification for having more than one caddie.

Rule 8-1 (Advice)

In view of the Definition of "Coach," it is recommended that Rule 8-1 be modified as follows:

> 8-1. Advice
>
> During a *stipulated round*, a player shall not give *advice* to anyone in the competition except his partner. A player may ask for advice during a stipulated round from only his partner, either of their caddies or, if applicable, their coaches.

Judy Bell, a former president of the USGA, testified that the Golfers with Disabilities pamphlet was not meant for the PGA Tour, but only for recreational golfers. While that may be, it begs the question of how the PGA Tour would handle the request of a blind pro golfer to have a coach in addition to a caddie. At oral argument, the attorney for the Tour was asked whether Rules 6- 4 and 8-1 could be modified without fundamentally altering the nature of the PGA's competition. To quote from the colloquy:

> THE COURT: How about the caddie and the coach for the blind golfer, as the pamphlet describes?
>
> MR. MALEDON: Your Honor, my answer would be the same. As long as it does not fundamentally alter the nature of the competition, there's not a problem with it. But again, You Honor, you'd have known the facts. You'd have to look at the purpose for the rule. And I submit to you, Your Honor, that engaging in those kinds of analogies do not advance the ball in terms of what we are talking about here.
>
> THE COURT: If I look at whether the purpose of the walking rule is to enhance competition by injecting fatigue into the equation, do I look at what Mr. Martin's disability does to him specifically insofar as inducing fatigue?

MR. MALEDON: No, Your Honor Absolutely not.

The paradox presented in the PGA Tour's position is readily apparent. A modification of the "one caddie only" rule to accommodate a blind golfer by providing him with a coach does not become the "reasonable" thing to do unless the PGA first conducts an individualized assessment of the golfer's disability--i.e., the PGA Tour must first recognize that he is blind, and then consider whether providing him a coach under his circumstances would give him a competitive advantage over the other golfers who aren't blind and thus don't need a coach. Yet in Casey Martin's situation, the PGA Tour adamantly refuses to assess the requested modification in light of the specifics of his disability. Inconsistently, it insists in this case that any modification of any of its rules would fundamentally alter the nature of its competition.

The rules, as demonstrated, are not so sacrosanct. The requested accommodation of a cart is eminently reasonable in light of Casey Martin's disability.

SO ORDERED.

UNITED STATES DISTRICT COURT
D. OREGON.

No. CIV. 97-6309-TC.

CASEY MARTIN,
Plaintiff,

v.

PGA TOUR INC., a Maryland corporation,
Defendant.

Jan. 30, 1998.

ORDER

COFFIN, United States Magistrate Judge:

Plaintiff brings this action pursuant to the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213. On January 26, 1998, the court heard oral arguments on defendant PGA TOUR's motion (# 20) for summary judgment and plaintiff Casey Martin's cross-motion (# 44) for partial summary judgment. After argument, the court made oral findings and rulings, denying the Tour's motion in part and granting Martin's motion in part. This written order supplements and elaborates on the oral findings.

BACKGROUND

The PGA Tour is a non-profit association of professional golfers. The PGA sponsors and cosponsors professional golf events on three tours: the regular PGA Tour, with approximately 200 players at any given time; the Senior PGA Tour, with approximately 100 players; and the Nike Tour, with approximately 170 players.

There are various ways to gain playing privileges on the tours conducted by the PGA. Chief among them is a three-

stage qualifying school tournament. The first stage consists of 72 holes. Those who score well enough in this stage advance to the second stage consisting of 72 holes. The top qualifiers, approximately 168 players, advance to the third and final stage consisting of 108 holes. The lowest 35 finishers plus ties are awarded playing privileges on the regular PGA Tour. The next 70 lowest scoring players obtain privileges to play on the Nike Tour. A player failing to qualify for the regular PGA Tour, but qualifying for the Nike Tour may obtain the privilege to play on the PGA Tour by winning three Nike Tour tournaments during a single season or by finishing in the top fifteen places on the Nike Tour money list.

To enter the qualifying school tournament, a prospective player must pay a $3,000 fee and submit two letters of reference. Plaintiff in this case entered the qualifying school tournament and made it through the first and second stages.

In the first two stages of the qualifying tournament, players are permitted to use golf carts. In the third stage, as well as on the regular PGA Tour and the Nike Tour, players are required to walk and are required to use caddies.[1] Plaintiff contends he suffers from a debilitating disease known as Klippel-Trenaunay-Weber Syndrome, and for purposes of this motion the Tour does not contest this assertion. Klippel-Trenaunay-Weber Syndrome is a venous malformation which curtails blood circulation in plaintiff's right leg. This condition has resulted in significant atrophy in the lower leg and bone deterioration of the tibia. Plaintiff further contends that his physical impairment substantially limits his ability to walk. Plaintiff filed this action, pursuant to the ADA, seeking to enjoin defendant's "no cart" rule during the third stage of the qualifying school tournament, and on the PGA and Nike

[1]Golf carts are permitted on the Senior PGA Tour which involves golfers 50 years and older.

Tours. Plaintiff asserts that by failing to provide him with a cart, defendant fails to make its tournaments accessible to individuals with disabilities in violation of the ADA.

This court granted a preliminary injunction directing defendant to allow plaintiff to use a cart during the third stage of the qualifying school tournament. Defendant then lifted the no cart rule for all players during the third stage of the qualifying school tournament. Plaintiff scored well enough in the tournament to attain playing privileges on the Nike Tour. This court extended the injunction by stipulation of both parties to include the first two tournaments on the Nike Tour. Defendant now moves for summary judgment contending that the ADA does not apply to it or its tournaments.

STANDARDS

Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552- 53, 91 L.Ed.2d 265 (1986). Rule 56(c) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case

with respect to which she has the burden of proof. *Id.* at 323, 106 S.Ct. at 2552. There is also no genuine issue of fact if, on the record taken as a whole, a rational trier of fact could not find in favor of the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538 (1986); *Taylor v. List*, 880 F.2d 1040 (9th Cir.1989).

On a motion for summary judgment, all reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir.1976). The inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Valandingham v. Bojorquez*, 866 F.2d 1135, 1137 (9th Cir.1989). Where different ultimate inferences may be drawn, summary judgment is inappropriate. *Sankovich v. Life Insurance Co. of North America*, 638 F.2d 136, 140 (9th Cir.1981).

DISCUSSION

Plaintiff alleges in his first claim for relief that defendant is a private entity which is or operates a place of public accommodation. As a result, plaintiff contends that defendant is subject to the ADA's prohibition of discrimination on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to) or operates a place of public accommodation. *See* 42 U.S.C. § 12182. Plaintiff alleges in his second claim that defendant is a private entity that offers examinations or courses related to applications, licensing, certifications, or credentialing for professional or trade purposes. Plaintiff thus contends that defendant is subject to the ADA's requirement that any person offering examinations or courses related to applications, licensing, certification, or credentialing for professional or trade

purposes shall do so in a place and manner accessible to persons with disabilities. *See* 42 U.S.C. § 12189. Plaintiff alleges in his third claim that defendant is an employer as defined in the ADA. *See* 42 U.S.C. § 12111(5). Thus, plaintiff contends that defendant is prohibited from discrimination against a qualified individual with a disability because of the disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a).

Defendant PGA Tour contends that it is entitled to summary judgment on all three of plaintiff's claims because it is a private non-profit establishment exempt from the ADA. *See* 42 U.S.C. § 12187.[2] Defendant argues, in the alternative, that even if it is not a private club it is entitled to summary judgment on counts one and two of plaintiff's complaint because the PGA and Nike Tour competitions do not constitute "places of public accommodation," and that the Nike Tour is not an examination or course. In addition, defendant argues that it is entitled to summary judgment in count three of plaintiff's complaint because plaintiff is not an "employee" of the PGA Tour.

A. Defendant is not Exempt from the ADA

As noted, a private club or establishment is exempt from coverage under Title III of the ADA (as well as Title II of the Civil Rights Act of 1964, which prohibits discrimination on the grounds of race, color religion, or national origin). Because of the importance of these laws, exemptions are

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[2] The exemption from coverage under the ADA found at 42 U.S.C. § 12187 applies to Title III of the ADA (public accommodations and services operated by private entities). With respect to Title I (prohibiting discrimination with regard to employment), an employer does not include a bona fide private membership club. *See* 42 U.S.C. § 12111(5)(B).

narrowly construed and the burden of proof rests on the party claiming the exemption. *See Nesmith v. YMCA*, 397 F.2d 96, 101 (4th Cir.1968); *Quijano v. University Federal Credit Union*, 617 F.2d 129, 131-32 (5th Cir.1980).

Before one can answer the question of whether the PGA Tour is entitled to the private club exemption, one must first define the nature of the entity:

Succinctly put, the Tour is an organization formed to promote and operate tournaments for the economic benefit of its members, a highly skilled group of professional golfers. As with all professional sports organizations, the Tour is part of the entertainment industry, offering competitive athletic events to the public, which in turn generate sponsorship of the events, network fees, advertising revenue, and, ultimately, the tournament prize money awarded the competitors.

The Tour, in short, is a commercial enterprise. The success of the Tour in generating revenue for its members is in direct proportion to public participation as spectators and viewers of the Tour's tournaments. Without this public participation, the primary objective of the Tour could not be achieved.

One of the principal cases relied upon by the PGA for its exemption claim actually cuts against its position:

In *Welsh v. Boy Scouts of America*, 993 F.2d 1267 (7th Cir.1993), the court found that the Boy Scouts was indeed a private club notwithstanding its membership total of over five million scouts.[3] [FN3] The *Welsh* court focused keenly on the purpose of membership in the Scouts when it criticized the dissenter's emphasis on the size of the organization:

> The dissent concludes that because the Boy Scouts have five million members ... it is neither selective nor

[3]Although the Welsh case involved the Civil Rights Act, the ADA and the Civil Rights Act are interrelated in terms and application.

> private.... This conclusion not only exaggerates the facts, it ignores the purpose of the Scouts' existence and punishes the Boy Scouts for its success in recruiting future quality leaders of society. Certainly Congress did not intend to condition the private club exclusion from Title II on the popularity of the organization. *The more pertinent factor regarding selectivity is the nexus between the organization's purpose and its membership requirements.*

Id. at 1277. (emphasis added).

Regarding that purpose, the court had earlier observed:

> The purpose of Scouting ... is to equip youth of all races, colors and creeds to fulfill their duty to God, to mature personally, and to help others. This can only be achieved by a boy who believes in God. How does one who denies the very existence of a Supreme Being presuppose to follow the Oath of the Boy Scouts of America?

Id.

Just as the large membership in the Scouts did not deprive the organization of its private club status when its membership requirements were fitted with the purpose of the group, so the relatively small membership of the PGA Tour does not confer private status on this entity when its selectivity is counterbalanced with the Tour's purpose. Generating revenue for members scarcely seems to qualify as the type of protectable interest Congress had in mind when it excluded private clubs from coverage under the ADA and Civil Rights Act.

In *Quijano v. University Federal Credit Union*, 617 F.2d 129 (5th Cir.1980), the court ruled that the private membership club exception to the Civil Rights Act did not

apply to a federally chartered credit union, notwithstanding its non-profit status. In doing so the court observed:

> One rarely abandons the path of logic and common sense when Webster is consulted for the precise meaning of a term. In reference to the type of club suggested by section 701(b)(2) exemption Webster's Third International Dictionary of the English Language offers the following definition at page 430:
>
> > club: an association of persons for social and recreational purposes or for the common promotion of some common object (as literature, science, political activity) usually jointly supported and meeting periodically, membership in social clubs usually being conferred by ballot and carrying the privilege of use of the club property.
>
> . . . .
>
> Credit unions, however useful they may be, exist for purely mercantile purposes and although they may be organized on a non-profit basis, member join credit unions in search of profits on their investments. Like . . . "auto clubs," credit unions are not clubs in any sense of the word.

Id. at 131, 133.

An analysis of the set of variables most commonly weighed by the courts in determining whether an organization is a bona fide private club mitigates against such a finding here. Those factors, as set forth in *United States v. Lansdowne Swim Club*, 713 F.Supp. 785 (E.D.Pa.1989) are listed and discussed as follows:

1. Genuine Selectivity

The Tour contends that because only very few golfers possess the requisite skills to become members of the Tour and compete at its events, and because these golfers are

selected through competition at qualifying tournaments, its members are chosen through an exceptionally selective process and this factor weighs heavily in its favor.

Defendant's eligibility requirements, however, measure skills. They are not designed to screen out members based upon social, moral, spiritual, or philosophical beliefs, or any other criteria used to protect freedom of association values which are at the core of the private club exemption. *See Quijano*, 617 F.2d 129; *Welsh*, 993 F.2d 1267. *See also United States v. Jordan*, 302 F.Supp. 370, 376 (consideration is given to whether the organization has a civic, fraternal, or social purpose accomplished through membership screening). As with all sports, only the most skilled players achieve professional status. The pool of professional competitors will always be an extremely small percentage of those who participate in the sport at recreational or other non-professional levels, not to mention the general public. Such natural "weeding-out" selectivity is inherent to athletics, and does nothing to confer "privacy" to the organizations to which professionals matriculate.

2. Membership Control

Professional golfers who play in fifteen or more regular PGA Tour events in a year have voting rights.[4] But—which seems more to the point—new members are not voted in by the current members—they play their way in. *See Jordan*, 302 F.Supp. at 375 (consideration is given to whether the existing members have any control over the admission of applicants for membership). The membership control of the organization does little to make it or keep it "private."

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[4] The voting rights these golfers have is limited to voting for player directors from a slate of candidates chosen by the existing player directors. Only four members of the policy board, consisting of nine members, are player directors.

3. History of Organization

The organization has existed since 1968. It clearly was not formed to evade the Civil Rights Act or ADA. Of course, the fact that an organization is not a "sham" tells us it is "bona fide," but not that it is a "private club."

4. Use of Facilities by Nonmembers

Defendant contends that only its members participate as players in Tour Events. Plaintiff points to numerous nonmembers who participate in the tournaments as vendors, reporters, score keepers, volunteers, and members of the gallery.

The court finds this factor cuts against private club status. Of particular force is the heavy reliance by the Tour on public participation for the purpose of generating revenue for the tour. *See Smith v. YMCA*, 462 F.2d 634, 648 (5th Cir.1972) (a YMCA which enjoyed a substantial amount of revenue from the general public was not a private club); *Evans v. Laurel Links, Inc.*, 261 F.Supp. 474 (E.D.Va.1966) (a golf club which opened its lunch counter to the public, which restaurant generated $27,568 in revenue for the club, thereby subjected the entire golf course to the Civil Rights Act).

5. Club's Purpose

As discussed previously, the mercantile purpose of the PGA Tour weighs heavily against private club status.

6. Whether the Club advertises for Members

Courts have held that organizations which advertise and solicit new members do not fall within the private club exemption. *See Wright v. Salisbury Club, Ltd.*, 632 F.2d 309 (4th Cir.1980).

The PGA Tour is extensively covered by the media. Its existence is well known to even the most casual golfers and followers of sports. The Tour has no more need or incentive

to advertise for golfers than do the Chicago Bulls for basketball players. The advertising factor carries little weight in the arena of professional sports.

7. Whether the Club is Nonprofit

The Tour is nonprofit, but yet its fundamental purpose is to enhance profits for its members. As in *Quijano*, the nonprofit status of a corporation that exists to further the commercial interests of its members does not weigh in favor of exempt status.

For the reasons stated, I reject the PGA Tour's argument that it is a private club and as such exempt from the ADA.

B. Defendant Operates a Place of Public Accommodation at the Golf Courses on which it Conducts its Tournaments

Defendant further contends that, if it is not found to be an exempt private club, the courses it operates are not open to the "general public" between the boundaries of play during its tournaments, and thus the tournament events are not "places of public accommodation."[5]

The term "public accommodation" is specifically defined to include the following places:

> (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
>
> (B) a restaurant, bar, or other establishment serving food or drink;
>
> (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

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[5] Under the ADA, reasonable accommodations must be afforded the disabled using places of public accommodations.

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, *golf course*, or other place of exercise or recreation.

42 U.S.C. § 12181(7) (emphasis added).

A golf course is specifically included on the list.

Defendant argues, however, that its courses are only places of public accommodation in those areas actually accessed by the public at large. It contends that since the public gallery is

not allowed inside the playing area, the fairways and greens of its golf courses are not places of public accommodation.

This argument is flawed.

First, if the PGA were correct, this renders the private club exemption virtually irrelevant to the issue of whether so-called private country clubs, for example, must comply with the ADA. Using the logic of the PGA, if the country club were found not to be a "bona fide private membership club" (as the term is discussed in the previous section), it could nonetheless refuse to accommodate any handicapped members by pointing out it only admits the country club's members (and not the public at large) on its grounds.

Second, the statute and regulations do not support the concept that places of public accommodation have zones of ADA application. PGA cites cases wherein private facilities do not lose their exempt status on the private portions of its facilities simply by operating a discrete public accommodation area (e.g., a private country club renting space to a private day care center open to nonmembers has ADA obligations only with respect to the day care center, according to DOJ regulations). But this is a far cry from the proposition that an operator of a place of public accommodation can create private enclaves within the facility of public accommodation and thus relegate the ADA to hop-scotch areas. May the day care center in the above example rope off a section for use only by the country club's members and be exempt from the ADA within those boundaries? I think not.

The PGA further cites, as an example of dual public/private zones of public accommodation places, the typical major league baseball stadium. The PGA argues that the bleachers are subject to the ADA because that is where the public is seated, but the dugout is not because the public is not allowed to mingle with the players therein.

What about a disabled manager of a team? May the St. Louis Cardinals refuse to construct a wheelchair ramp to the visitor's dugout to accommodate a disabled manager of the Chicago Cubs simply because spectators cannot go into the dugout?

In a somewhat similar case regarding the Rose Garden Arena, Magistrate Judge Donald Ashmanskas in finding that the executive suites in the arena, even though not open to the general public, are subject to the ADA stated:

> Many facilities that are classified as public accommodations are open only to specific invitees. For instance, a facility that specializes in hosting wedding receptions and private parties may be open only to invitees of the bride and groom, yet it clearly qualifies as a public accommodation. *See* 42 U.S.C. § 12181(7). Attendance at a political convention is strictly controlled, yet the convention center is still a place of public accommodation. *See* 42 U.S.C. § 12181(7). A gymnasium or golf course may be open only to authorized members and their guests, but that does not necessarily preclude it from being classified as a place of public accommodation. Id. A private school may be open only to enrolled students, but it is still a place of public accommodation. *Id.*

Independent Living Resources v. Oregon Arena Corp., 982 F.Supp. 698, 758- 59 (D.Or.1997)

What the PGA also overlooks is that people other than its own Tour members are indeed allowed within the boundary lines of play during its tournaments. What if a member-golfer opted to hire a disabled caddy? Once the caddy steps within the boundaries of the playing area of the golf course—a statutorily defined place of public accommodation—does he step outside the boundaries of the ADA simply because the public at large cannot join him there? If this were the law,

how could such be reconciled with the inclusion of private schools, whose corridors, classrooms, and restrooms are clearly not accessible to the public, on the list of places of public accommodations?

Accordingly, I reject defendant's argument that the ADA does not apply to the areas of competition on the golf course during tournaments.

C. Issue of Employment and Whether the Nike Tour is a Course or Examination

Whether plaintiff is an employee of the Tour and whether the Nike Tour constitutes an examination or course within the meaning of the ADA are issues that I defer until the trial of the case.

CONCLUSION

For the reasons stated above, defendant's motion (# 20) for summary judgment is denied. Plaintiff's motion (# 44) for partial summary judgment is granted as to the issue of whether defendant is exempt from the ADA and whether defendant operates a place of public accommodation, and is otherwise denied.

STATUTORY APPENDIX

AMERICANS WITH DISABILITIES ACT

42 U.S.C. chapter 126

§ 12101. Findings and purpose

(a) Findings

The Congress finds that--

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing

facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

§ 12102. Definitions

As used in this chapter:

(1) Auxiliary aids and services

The term "auxiliary aids and services" includes—

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State

The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

SUBCHAPTER I—EMPLOYMENT

§ 12111. Definitions

As used in this subchapter:

(1) Commission

The term "Commission" means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term "employer" does not include—

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of Title 26.

(6) Illegal use of drugs

(A) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C.A. § 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C.A. § 812].

(7) Person, etc.

The terms "person", "labor organization", "employment agency" "commerce", and "industry affecting commerce" shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

§ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered

entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries

(1) In general

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation

(A) Presumption

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in

by such corporation shall be presumed to be engaged in by such employer.

(B) Exception

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on--

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that--

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

§ 12113. Defenses

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) Religious entities

(1) In general

This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular

religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) Religious tenets requirement

Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

(d) List of infectious and communicable diseases

(1) In general

The Secretary of Health and Human Services, not later than 6 months after July 26, 1990, shall—

(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;

(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;

(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissability to the general public.

Such list shall be updated annually.

(2) Applications

In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

(3) Construction

Nothing in this chapter shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissability published by the Secretary of Health and Human Services.

§ 12114. Illegal use of drugs and alcohol

(a) Qualified individual with a disability

For purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction

Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed

to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

(c) Authority of covered entity

A covered entity—

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that—

(A) employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying

with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

(d) Drug testing

(1) In general

For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) Construction

Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

(e) Transportation employees

Nothing in this subchapter shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to—

(1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and

(2) remove such persons who test positive for illegal use of drugs and on- duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c) of this section.

§ 12115. Posting notices

Every employer, employment agency, labor organization, or joint labor- management committee covered under this subchapter shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this chapter, in the manner prescribed by section 2000e-10 of this title.

§ 12116. Regulations

Not later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of Title 5.

§ 12117. Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, conc ning employment.

(b) Coordination

The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.] shall develop procedures to ensure that administrative

complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed.Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 not later than 18 months after July 26, 1990.

* * * * *

SUBCHAPTER III—PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES

§ 12181. Definitions

As used in this subchapter:

(1) Commerce

The term "commerce" means travel, trade, traffic, commerce, transportation, or communication—

(A) among the several States;

(B) between any foreign country or any territory or possession and any State; or

(C) between points in the same State but through another State or foreign country.

(2) Commercial facilities

The term "commercial facilities" means facilities—

(A) that are intended for nonresidential use; and

(B) whose operations will affect commerce.

Such term shall not include railroad locomotives, railroad freight cars, railroad cabooses, railroad cars described in section 12162 or covered under this subchapter, railroad rights-of-way, or facilities that are covered or expressly exempted from coverage under the Fair Housing Act of 1968 (42 U.S.C. 3601 et seq.).

(3) Demand responsive system

The term "demand responsive system" means any system of providing transportation of individuals by a vehicle, other than a system which is a fixed route system.

(4) Fixed route system

The term "fixed route system" means a system of providing transportation of individuals (other than by aircraft) on which a vehicle is operated along a prescribed route according to a fixed schedule.

(5) Over-the-road bus

The term 'over-the-road bus" means a bus characterized by an elevated passenger deck located over a baggage compartment.

(6) Private entity

The term "private entity" means any entity other than a public entity (as defined in section 12131(1) of this title).

(7) Public accommodation

The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce—

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

(8) Rail and railroad

The terms "rail" and "railroad" have the meaning given the term "railroad" in section 431(e) of Title 45.

(9) Readily achievable

The term "readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include—

(A) the nature and cost of the action needed under this chapter;

(B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;

(C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

(10) Specified public transportation

The term "specified public transportation" means transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

(11) Vehicle

The term "vehicle" does not include a rail passenger car, railroad locomotive, railroad freight car, railroad caboose, or a railroad car described in section 12162 of this title or covered under this subchapter.

§ 12182. Prohibition of discrimination by public accommodations

(a) General rule

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

(b) Construction

(1) General prohibition

(A) Activities

(i) Denial of participation

It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

(ii) Participation in unequal benefit

It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or

accommodation that is not equal to that afforded to other individuals.

(iii) Separate benefit

It shall be discriminatory to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

(iv) Individual or class of individuals

For purposes of clauses (i) through (iii) of this subparagraph; the term "individual or class of individuals" refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.

(B) Integrated settings

Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

(C) Opportunity to participate

Notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different.

(D) Administrative methods

An individual or entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration—

(i) that have the effect of discriminating on the basis of disability; or

(ii) that perpetuate the discrimination of others who are subject to common administrative control.

(E) Association

It shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(2) Specific prohibitions

(A) Discrimination

For purposes of subsection (a) of this section, discrimination includes—

(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making

such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable; and

(v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.

(B) Fixed route system

(i) Accessibility

It shall be considered discrimination for a private entity which operates a fixed route system and which is not subject to section 12184 of this title to purchase or lease a vehicle with a seating capacity in excess of 16 passengers (including the driver) for use on such system, for which a solicitation is made after the 30th day following the effective date of this subparagraph, that is not readily accessible to and usable by

individuals with disabilities, including individuals who use wheelchairs.

(ii) Equivalent service

If a private entity which operates a fixed route system and which is not subject to section 12184 of this title purchases or leases a vehicle with a seating capacity of 16 passengers or less (including the driver) for use on such system after the effective date of this subparagraph that is not readily accessible to or usable by individuals with disabilities, it shall be considered discrimination for such entity to fail to operate such system so that, when viewed in its entirety, such system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities.

(C) Demand responsive system

For purposes of subsection (a) of this section, discrimination includes—

(i) a failure of a private entity which operates a demand responsive system and which is not subject to section 12184 of this title to operate such system so that, when viewed in its entirety, such system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities; and

(ii) the purchase or lease by such entity for use on such system of a vehicle with a seating capacity in excess of 16 passengers (including the driver), for which solicitations are made after the 30th day following the effective date of this subparagraph, that is not readily accessible to and usable by individuals with disabilities (including individuals who use wheelchairs) unless such entity can demonstrate that such system, when viewed in its entirety, provides a level of

service to individuals with disabilities equivalent to that provided to individuals without disabilities.

(D) Over-the-road buses

(i) Limitation on applicability

Subparagraphs (B) and (C) do not apply to over-the-road buses.

(ii) Accessibility requirements

For purposes of subsection (a) of this section, discrimination includes (I) the purchase or lease of an over-the-road bus which does not comply with the regulations issued under section 12186(a)(2) of this title by a private entity which provides transportation of individuals and which is not primarily engaged in the business of transporting people, and (II) any other failure of such entity to comply with such regulations.

(3) Specific construction

Nothing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others. The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.

§ 12183. New construction and alterations in public accommodations and commercial facilities

(a) Application of term

Except as provided in subsection (b) of this section, as applied to public accommodations and commercial facilities,

discrimination for purposes of section 12182(a) of this title includes—

(1) a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this subchapter; and

(2) with respect to a facility or part thereof that is altered by, on behalf of, or for the use of an establishment in a manner that affects or could affect the usability of the facility or part thereof, a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. Where the entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function, the entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

(b) Elevator

Subsection (a) of this section shall not be construed to require the installation of an elevator for facilities that are less than three stories or have less than 3,000 square feet per story unless the building is a shopping center, a shopping mall, or

the professional office of a health care provider or unless the Attorney General determines that a particular category of such facilities requires the installation of elevators based on the usage of such facilities.

§ 12184. Prohibition of discrimination in specified public transportation services provided by private entities

(a) General rule

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce.

(b) Construction

For purposes of subsection (a) of this section, discrimination includes—

(1) the imposition or application by a [FN1] entity described in subsection (a) of this section of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully enjoying the specified public transportation services provided by the entity, unless such criteria can be shown to be necessary for the provision of the services being offered;

(2) the failure of such entity to—

(A) make reasonable modifications consistent with those required under section 12182(b)(2)(A)(ii) of this title;

(B) provide auxiliary aids and services consistent with the requirements of section 12182(b)(2)(A)(iii) of this title; and

(C) remove barriers consistent with the requirements of section 12182(b)(2)(A) of this title and with the requirements of section 12183(a)(2) of this title;

(3) the purchase or lease by such entity of a new vehicle (other than an automobile, a van with a seating capacity of less than 8 passengers, including the driver, or an over-the-road bus) which is to be used to provide specified public transportation and for which a solicitation is made after the 30th day following the effective date of this section, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs; except that the new vehicle need not be readily accessible to and usable by such individuals if the new vehicle is to be used solely in a demand responsive system and if the entity can demonstrate that such system, when viewed in its entirety, provides a level of service to such individuals equivalent to the level of service provided to the general public;

(4)(A) the purchase or lease by such entity of an over-the-road bus which does not comply with the regulations issued under section 12186(a)(2) of this title; and

(B) any other failure of such entity to comply with such regulations; and

(5) the purchase or lease by such entity of a new van with a seating capacity of less than 8 passengers, including the driver, which is to be used to provide specified public transportation and for which a solicitation is made after the 30th day following the effective date of this section that is not readily accessible to or usable by individuals with disabilities, including individuals who use wheelchairs; except that the new van need not be readily accessible to and usable by such individuals if the entity can demonstrate that the system for which the van is being purchased or leased, when viewed in its entirety, provides a level of service to such individuals equivalent to the level of service provided to the general public;

(6) the purchase or lease by such entity of a new rail passenger car that is to be used to provide specified public

transportation, and for which a solicitation is made later than 30 days after the effective date of this paragraph, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs; and

(7) the remanufacture by such entity of a rail passenger car that is to be used to provide specified public transportation so as to extend its usable life for 10 years or more, or the purchase or lease by such entity of such a rail car, unless the rail car, to the maximum extent feasible, is made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(c) Historical or antiquated cars

(1) Exception

To the extent that compliance with subsection (b)(2)(C) or (b)(7) of this section would significantly alter the historic or antiquated character of a historical or antiquated rail passenger car, or a rail station served exclusively by such cars, or would result in violation of any rule, regulation, standard, or order issued by the Secretary of Transportation under the Federal Railroad Safety Act of 1970 [45 U.S.C.A § 431 et seq.], such compliance shall not be required.

(2) Definition

As used in this subsection, the term "historical or antiquated rail passenger car" means a rail passenger car—

(A) which is not less than 30 years old at the time of its use for transporting individuals;

(B) the manufacturer of which is no longer in the business of manufacturing rail passenger cars; and

(C) which—

(i) has a consequential association with events or persons significant to the past; or

(ii) embodies, or is being restored to embody, the distinctive characteristics of a type of rail passenger car used in the past, or to represent a time period which has passed.

§ 12185. Study

(a) Purposes

The Office of Technology Assessment shall undertake a study to determine—

(1) the access needs of individuals with disabilities to over-the-road buses and over-the-road bus service; and

(2) the most cost-effective methods for providing access to over-the-road buses and over-the-road bus service to individuals with disabilities, particularly individuals who use wheelchairs, through all forms of boarding options.

(b) Contents

The study shall include, at a minimum, an analysis of the following:

(1) The anticipated demand by individuals with disabilities for accessible over-the-road buses and over-the-road bus service.

(2) The degree to which such buses and service, including any service required under sections 12184(b)(4) and 12186(a)(2) of this title, are readily accessible to and usable by individuals with disabilities.

(3) The effectiveness of various methods of providing accessibility to such buses and service to individuals with disabilities.

(4) The cost of providing accessible over-the-road buses and bus service to individuals with disabilities, including consideration of recent technological and cost saving developments in equipment and devices.

(5) Possible design changes in over-the-road buses that could enhance accessibility, including the installation of accessible restrooms which do not result in a loss of seating capacity.

(6) The impact of accessibility requirements on the continuation of over-the- road bus service, with particular consideration of the impact of such requirements on such service to rural communities.

(c) Advisory committee

In conducting the study required by subsection (a) of this section, the Office of Technology Assessment shall establish an advisory committee, which shall consist of—

(1) members selected from among private operators and manufacturers of over- the-road buses;

(2) members selected from among individuals with disabilities, particularly individuals who use wheelchairs, who are potential riders of such buses; and

(3) members selected for their technical expertise on issues included in the study, including manufacturers of boarding assistance equipment and devices.

The number of members selected under each of paragraphs (1) and (2) shall be equal, and the total number of members selected under paragraphs (1) and (2) shall exceed the number of members selected under paragraph (3).

(d) Deadline

The study required by subsection (a) of this section, along with recommendations by the Office of Technology Assessment, including any policy options for legislative action, shall be submitted to the President and Congress within 36 months after July 26, 1990. If the President determines that compliance with the regulations issued pursuant to section 12186(a)(2)(B) of this title on or before

the applicable deadlines specified in section 12186(a)(2)(B) of this title will result in a significant reduction in intercity over-the-road bus service, the President shall extend each such deadline by 1 year.

(e) Review

In developing the study required by subsection (a) of this section, the Office of Technology Assessment shall provide a preliminary draft of such study to the Architectural and Transportation Barriers Compliance Board established under section 792 of Title 29. The Board shall have an opportunity to comment on such draft study, and any such comments by the Board made in writing within 120 days after the Board's receipt of the draft study shall be incorporated as part of the final study required to be submitted under subsection (d) of this section.

§ 12186. Regulations

(a) Transportation provisions

(1) General rule

Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations in an accessible format to carry out sections 12182(b)(2)(B) and (C) of this title and to carry out section 12184 of this title (other than subsection (b)(4)).

(2) Special rules for providing access to over-the-road buses

(A) Interim requirements

(i) Issuance

Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations in an accessible format to carry out sections 12184(b)(4) and 12182(b)(2)(D)(ii) of this title that require each private entity which uses an over-

the-road bus to provide transportation of individuals to provide accessibility to such bus; except that such regulations shall not require any structural changes in over-the-road buses in order to provide access to individuals who use wheelchairs during the effective period of such regulations and shall not require the purchase of boarding assistance devices to provide access to such individuals.

(ii) Effective period

The regulations issued pursuant to this subparagraph shall be effective until the effective date of the regulations issued under subparagraph (B).

(B) Final requirement

(i) Review of study and interim requirements

The Secretary shall review the study submitted under section 12185 of this title and the regulations issued pursuant to subparagraph (A).

(ii) Issuance

Not later than 1 year after the date of the submission of the study under section 12185 of this title, the Secretary shall issue in an accessible format new regulations to carry out sections 12184(b)(4) and 12182(b)(2)(D)(ii) of this title that require, taking into account the purposes of the study under section 12185 of this title and any recommendations resulting from such study, each private entity which uses an over-the-road bus to provide transportation to individuals to provide accessibility to such bus to individuals with disabilities, including individuals who use wheelchairs.

(iii) Effective period

Subject to section 12185(d) of this title, the regulations issued pursuant to this subparagraph shall take effect—

(I) with respect to small providers of transportation (as defined by the Secretary), 3 years after the date of issuance of final regulations under clause (ii); and

(II) with respect to other providers of transportation, 2 years after the date of issuance of such final regulations.

(C) Limitation on requiring installation of accessible restrooms

The regulations issued pursuant to this paragraph shall not require the installation of accessible restrooms in over-the-road buses if such installation would result in a loss of seating capacity.

(3) Standards

The regulations issued pursuant to this subsection shall include standards applicable to facilities and vehicles covered by sections 12182(b)(2) and 12184 of this title.

(b) Other provisions

Not later than 1 year after July 26, 1990, the Attorney General shall issue regulations in an accessible format to carry out the provisions of this subchapter not referred to in subsection (a) of this section that include standards applicable to facilities and vehicles covered under section 12182 of this title.

(c) Consistency with ATBCB guidelines

Standards included in regulations issued under subsections (a) and (b) of this section shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204 of this title.

(d) Interim accessibility standards

(1) Facilities

If final regulations have not been issued pursuant to this section, for new construction or alterations for which a valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under this section,

and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities as required under section 12183 of this title, except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 12204(a) of this title, compliance with such supplemental minimum guidelines shall be necessary to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

(2) Vehicles and rail passenger cars

If final regulations have not been issued pursuant to this section, a private entity shall be considered to have complied with the requirements of this subchapter, if any, that a vehicle or rail passenger car be readily accessible to and usable by individuals with disabilities, if the design for such vehicle or car complies with the laws and regulations (including the Minimum Guidelines and Requirements for Accessible Design and such supplemental minimum guidelines as are issued under section 12204(a) of this title) governing accessibility of such vehicles or cars, to the extent that such laws and regulations are not inconsistent with this subchapter and are in effect at the time such design is substantially completed.

§ 12187. Exemptions for private clubs and religious organizations

The provisions of this subchapter shall not apply to private clubs or establishments exempted from coverage under title II

of the Civil Rights Act of 1964 (42 U.S.C. 2000-a(e)) [42 U.S.C.A. § 2000a et seq.] or to religious organizations or entities controlled by religious organizations, including places of worship.

§ 12188. Enforcement

(a) In general

(1) Availability of remedies and procedures

The remedies and procedures set forth in section 2000a-3(a) of this title are the remedies and procedures this subchapter provides to any person who is being subjected to discrimination on the basis of disability in violation of this subchapter or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 12183 of this title. Nothing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions.

(2) Injunctive relief

In the case of violations of sections 12182(b)(2)(A)(iv) and section [FN1] 12183(a) of this title, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this subchapter. Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by this subchapter.

(b) Enforcement by Attorney General

(1) Denial of rights

(A) Duty to investigate

(i) In general

The Attorney General shall investigate alleged violations of this subchapter, and shall undertake periodic reviews of compliance of covered entities under this subchapter.

(ii) Attorney General certification

On the application of a State or local government, the Attorney General may, in consultation with the Architectural and Transportation Barriers Compliance Board, and after prior notice and a public hearing at which persons, including individuals with disabilities, are provided an opportunity to testify against such certification, certify that a State law or local building code or similar ordinance that establishes accessibility requirements meets or exceeds the minimum requirements of this chapter for the accessibility and usability of covered facilities under this subchapter. At any enforcement proceeding under this section, such certification by the Attorney General shall be rebuttable evidence that such State law or local ordinance does meet or exceed the minimum requirements of this chapter.

(B) Potential violation

If the Attorney General has reasonable cause to believe that—

(i) any person or group of persons is engaged in a pattern or practice of discrimination under this subchapter; or

(ii) any person or group of persons has been discriminated against under this subchapter and such discrimination raises an issue of general public importance, the Attorney General may commence a civil action in any appropriate United States district court.

(2) Authority of court

In a civil action under paragraph (1)(B), the court—

(A) may grant any equitable relief that such court considers to be appropriate, including, to the extent required by this subchapter—

(i) granting temporary, preliminary, or permanent relief;

(ii) providing an auxiliary aid or service, modification of policy, practice, or procedure, or alternative method; and

(iii) making facilities readily accessible to and usable by individuals with disabilities;

(B) may award such other relief as the court considers to be appropriate, including monetary damages to persons aggrieved when requested by the Attorney General; and

(C) may, to vindicate the public interest, assess a civil penalty against the entity in an amount—

(i) not exceeding $50,000 for a first violation; and

(ii) not exceeding $100,000 for any subsequent violation.

(3) Single violation

For purposes of paragraph (2)(C), in determining whether a first or subsequent violation has occurred, a determination in a single action, by judgment or settlement, that the covered entity has engaged in more than one discriminatory act shall be counted as a single violation.

(4) Punitive damages

For purposes of subsection (b)(2)(B) of this section, the term "monetary damages" and "such other relief" does not include punitive damages.

(5) Judicial consideration

In a civil action under paragraph (1)(B), the court, when considering what amount of civil penalty, if any, is

appropriate, shall give consideration to any good faith effort or attempt to comply with this chapter by the entity. In evaluating good faith, the court shall consider, among other factors it deems relevant, whether the entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the unique needs of a particular individual with a disability.

§ 12189. Examinations and courses

Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

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IN THE

Supreme Court of the United States

PGA TOUR, INC.,

Petitioner,

v.

CASEY MARTIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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Respondent Casey Martin respectfully submits this brief in opposition to the petition for a writ of certiorari which seeks review of a March 6, 2000 decision of the United States Court of Appeals for the Ninth Circuit. That decision is reported at 204 F.3d 994 (9th Cir. 2000) and set forth in petitioner's appendix at App. 1a-15a.

STATEMENT OF THE CASE

Petitioner has failed to meet its burden of demonstrating that a "compelling reason" exists for this Court to review the Ninth Circuit's straightforward application of settled legal principles to the unique factual record before it. Sup. Ct. R. 10. The petition presents fact-intensive contentions that do not warrant review by this Court because they involve highly unusual circumstances that are unlikely to recur and in any event have little or no application beyond the small group of professional golfers eligible to compete in PGA-sponsored events. *See* App. 12a (Ninth Circuit observation that decision was "intensively fact-based" and is unlikely to have broader consequences); *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) (certiorari ordinarily will be denied if the case involves circumstances or issues which are unlikely to be repeated).

The Ninth Circuit's decision simply enforced on an undisputed record unambiguous language in Title III of the Americans with Disabilities Act ("ADA") establishing that golf courses owned and operated by petitioner are places of public accommodation. Consistent with the individualized inquiry endorsed by this Court and circuit courts addressing the issue, the Ninth Circuit also held that the ADA *requires* petitioner to accommodate Mr. Martin's disability unless it proves that use of a cart would fundamentally alter the nature

of its competitions by giving *Mr. Martin* (as opposed to a hypothetical able-bodied golfer) a competitive advantage.[1]

The Ninth Circuit's "intensively fact-based" holding (App. 12a) was expressly based on detailed factual findings made in the district court following a six-day bench trial supporting the conclusion that permitting Mr. Martin to use a golf cart would not fundamentally alter the nature of PGA and Nike Tour (now known as the Buy.com Tour) golf. As the Ninth Circuit stated, the issue of "whether the accommodation of permitting Martin to use a golf cart fundamentally alters the PGA and Nike Tour competitions . . . was fully tried in the district court," and the district court's findings were affirmed under the appropriate clearly erroneous standard. App. 10a. Those findings demonstrated that "[a]ll that the cart does is permit Martin access to a type of competition in which he otherwise could not engage because of his disability." *Id.* at 11a. In addition, the Ninth Circuit correctly concluded that petitioner could not meet its burden because the evidence showed that petitioner's own walking requirement is riddled

1. Petitioner minimizes Mr. Martin's permanent disability, suggesting that it only "causes him pain." Pet. at 5. The Ninth Circuit noted "[t]here is no dispute that Martin is profoundly disabled" (App. 2a) and petitioner concedes that Mr. Martin has a disability under the ADA. Mr. Martin suffers from a congenital, degenerative circulatory condition called Klippel-Trenaunay-Weber Syndrome. The condition, first diagnosed when Mr. Martin was three years old, is manifested in a massive, permanent malformation of his right leg that dramatically limits his ability to walk. Although blood can circulate into his lower right leg, blockage at knee level prevents recirculation, resulting in severe pain and atrophy of the lower leg. He is placed at "significant risk" of fracturing his tibia, hemorrhaging and developing deep blood clots "by the simple act of walking," and other routine life activities. The condition has progressively deteriorated and Mr. Martin's right leg is at risk of amputation above the knee. Resp't App. 3a-4a. As the *Martin* district court observed, "[t]o perceive that the cart puts him — with his condition — at a competitive advantage is a gross distortion of reality." App. 36a.

with exceptions which permit the use of carts, and there is no Rule of Golf which prohibits accommodations for people with permanent disabilities who cannot walk the course.

The Ninth Circuit's decision is consistent with relevant precedent from this Court and other circuits, and presents no important federal question that needs to be resolved by this Court.[2] The Seventh Circuit's decision in *Olinger v. United States Golf Ass'n*, 205 F.3d 1001 (7th Cir. 2000), *reh'g denied en banc* (June 22, 2000) does not create a conflict on the law. Petitioner concedes that the Seventh Circuit never even addressed whether Title III applies to an entity offering professional golf tournaments, and fails to mention that the *Olinger* district court decision affirmed by the Seventh Circuit expressly followed *Martin*'s holding on the applicability of Title III.

Petitioner's secondary contention that on "essentially the same facts" (Pet. at 9) *Olinger* reached a different conclusion than *Martin* on whether Title III requires reasonable modification of a walking requirement is rebutted by reference to both *Olinger* and *Martin*. The Ninth Circuit expressly stated that the detailed factual findings made by the *Martin* district court distinguished the equally fact-specific holding in *Olinger*. The district court in *Olinger* stated that "this case is different from the *Martin* case," and emphasized important differences in both the factual records of the cases and the nature of the competitions to which the respective individuals sought access. The Seventh Circuit acknowledged the district court decision

2. The United States Department of Justice filed a brief and appeared at oral argument in the Ninth Circuit in support of Mr. Martin's position that petitioner is subject to Title III of the ADA and that allowing Mr. Martin to use a cart in PGA events is a reasonable modification that would not fundamentally alter the nature of PGA events. As the agency charged by Congress to issue implementing regulations "and to enforce Title III in court, the Department's views are entitled to deference." *Bragdon v. Abbott*, 524 U.S. 624, 646 (1998) (citation omitted).

in *Martin*, but never suggested that its holding was inconsistent with *Martin*. Thus, any differences in the decisions arise from differing factual records, not from conflicts on the law.

The Ninth Circuit properly rejected petitioner's attempt to evade the plain import of the ADA. Petitioner's proposed narrowing of the ADA finds no support in existing law, is utterly inconsistent with the broad remedial purpose of the ADA and, if recognized, would permit petitioner to exclude individuals not only on the basis of disability, but on the basis of race and religion. In sum, petitioner has not shown that the Ninth Circuit's decision involves recurring issues of national importance, conflicts with precedent from this Court or from other circuit courts, or otherwise warrants this Court's review.

REASONS FOR DENYING THE WRIT

PETITIONER PRESENTS NO ISSUE WARRANTING REVIEW BY THIS COURT

A. The Ninth Circuit's Holding That Petitioner Is Subject To Title III Of The ADA Is Consistent With Precedent From This Court And Decisions From Other Circuit Courts Of Appeal

The Ninth Circuit's interpretation of Title III is consistent with every federal court decision construing that provision, including the *Olinger* decision which petitioner inaccurately suggests somehow conflicts with the Ninth Circuit's decision. The conflict suggested by petitioner simply does not exist. Holding that the USGA is subject to Title III of the ADA, the *Olinger* district court expressly stated that it was *joining* the *Martin* decision (later affirmed by the Ninth Circuit). The district court in *Olinger* rejected the same argument advanced here by petitioner: the "USGA's contention that it alone may set the rules is simply another version of its argument that the USGA is exempt from the provisions of the ADA, '[a]nd it is not.' " *Olinger v. United States Golf Ass'n*, 55 F. Supp. 2d 926, 933

(N.D. Ind. 1999) (quoting *Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242, 1246 (D. Or. 1998), *aff'd*, 204 F.3d 994 (9th Cir. 2000)), *aff'd*, 205 F.3d 1001 (7th Cir. 2000). No contrary decision exists. Petitioner relegates to a footnote the critical fact that the Seventh Circuit in *Olinger* "did not resolve" the applicability of Title III (Pet. at 13 n.16), and fails to acknowledge that the Seventh Circuit affirmed the district court's decision. *Olinger*, 205 F.3d at 1007; *see also id.* at 1005 (Seventh Circuit statement that it "can resolve this appeal on a more narrow ground"). Accordingly, there is no conflict between *Olinger* and *Martin*.

The Ninth Circuit's decision reflects a proper application of the plain language of the ADA and accords with uniform federal court authority addressing the scope of Title III of the ADA. Title III broadly provides that:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a).

Petitioner concedes that Congress expressly defined "public accommodation" to include, *inter alia*, "a golf course." Pet. at 13; 42 U.S.C. § 12181(7)(L). Nor does it dispute that the PGA "owns or operates certain golf courses" on which its golf tournaments are played. App. 2a. These dispositive concessions conclusively establish that Title III applies to the PGA. As the Ninth Circuit stated, "[t]here is nothing ambiguous about this provision [42 U.S.C. § 12181(7)(L)]; golf courses are public accommodations." App. 4a. As this Court recently stated, "unambiguous statutory text" in the ADA must be enforced as written. *Pennsylvania Dep't of Corr. v. Yeskey*, 524

U.S. 206, 212 (1998). When interpreting the term "public accommodation" under civil rights legislation, "it does not follow that the scope of [civil rights legislation] should be restricted to the primary objects of Congress' concern when *a natural reading of its language would call for broader coverage*." *Daniel v. Paul*, 395 U.S. 298, 307 (1969) (emphasis added). In accordance with this mandate, the Ninth Circuit properly affirmed the District Court's grant of summary judgment on an undisputed record that golf courses owned and operated by the PGA are places of public accommodation and therefore the PGA must allow a reasonable modification of its walking requirement in order to permit Mr. Martin to participate in its events. App. 15a.

Petitioner fails to mention that the Ninth Circuit's decision also accords with the decisions of other Courts of Appeals that have addressed the applicability of Title III of the ADA. *See, e.g., Menkowitz v. Pottstown Memorial Med. Ctr.*, 154 F.3d 113, 121-23 (3d Cir. 1998) (because Congress defined "public accommodation" to include, *inter alia*, a "hospital," 42 U.S.C. § 12181(7)(F), Title III requires hospital to make reasonable modifications to permit disabled doctor to practice at hospital); *see also Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 33 (1999) (court noted that because 42 U.S.C. § 12181(7)(E) lists a "bakery" as a place of public accommodation, a bakery's refusal to sell bread to a blind person for use outside the premises would fall under the statute), *opinion amended on denial of reh'g*, 204 F.3d 392 (2d Cir. 2000); *Amir v. St. Louis Univ.*, 184 F.3d 1017, 1027 (8th Cir. 1999) (noting that 42 U.S.C. § 12181(7)(J) lists "undergraduate, or postgraduate private school" as a place of public accommodation so that St. Louis University was a place of public accommodation); *Johnson v. Gambrinus Co./Spoetzel Brewery*, 116 F.3d 1052, 1065 (5th Cir. 1997) (Title III applied and required brewery to make reasonable modification of its no animals policy to accommodate blind plaintiff).

The petition is an extended detour around the unambiguous language of Title III and the Ninth Circuit's straightforward application of the statute. First, petitioner attempts to artificially "bifurcate" the golf courses it operates into public zones ("outside the ropes") and private zones ("inside the ropes") by engrafting onto unambiguous statutory language an additional provision that the places listed in 42 U.S.C. § 12181(7) (which include "golf courses") are not subject to the ADA unless open to every member of the public. Pet. at 14. Petitioner concedes that the ADA applies to spectators at its golf courses, but argues that Congress intended the ADA to extend only up to the ropes separating competitors from spectators. *Id.*[3] The Ninth Circuit correctly rejected this contrivance, noting that "Title III does not restrict its coverage to members of the public; it provides that " '[n]o *individual* shall be discriminated against' in the enjoyment of public accommodations by reason of disability." App. 7a n.7 (emphasis added).

The game of golf is the activity normally engaged in at a golf course. *Daniel*, 395 U.S. at 308 ("statutory language" defining public accommodation under Civil Rights Act . . . "should be given full effect according to its generally accepted meaning"). Golf courses do not cease to be covered by the ADA when PGA competitors are playing on them. 28 C.F.R. pt. 36, app. B § 36.201 (scope of the term "place of public accommodation" under Title III "is *quite extensive* and . . . [applies] even if the operation is only for a short time") (emphasis added). The clarity of the statutory language compels rejection of the PGA's attempt to rewrite the statute. *Yeskey*, 524 U.S. at 212; 28 C.F.R. pt. 36, app. B § C ("A facility . . . is a place of accommodation for purposes of the ADA to the extent

3. It is undisputed that the area "inside the ropes" is not even limited to competitors. As the Ninth Circuit noted, scores of individuals who are not PGA members, including caddies, tour personnel and reporters, are permitted "inside the ropes" during PGA competition. App. 5a.

that its operations include those type of activities engaged in . . . by the facilities" listed in 42 U.S.C. § 12181(7)).

Courts interpreting Title II of the Civil Rights Act (which Title III of the ADA was modeled on) have consistently held that once a portion of a location is deemed a "public accommodation," the entire location is covered, and have rejected arguments that an operator of a public accommodation may divide its facilities into covered and non-covered zones. As one federal court stated:

> This bifurcation [of public accommodation into covered and non-covered areas] has no support in the plain language of the Act or the case law interpreting it. Once an establishment is determined to be a place of entertainment [also defined as a public accommodation under the ADA], *the entire facility is identified as such.*

United States v. Lansdowne Swim Club, 713 F. Supp. 785, 791 (E.D. Pa. 1989) (emphasis added), *aff'd*, 894 F.2d 83 (3d Cir. 1990); *see Daniel*, 395 U.S. at 306-08 (snack bar's status as covered establishment brings entire entertainment facility within Title II).

Petitioner also suggests that despite Congress' inclusion of golf courses as places of public accommodation in Title III, golfers competing on such courses should be excluded from statutory coverage because Congress did not specifically provide for their coverage. *See* Pet. at 11, 14 & n.18. This Court recently rejected the same argument under the ADA:

> [A]ssuming . . . that Congress did not "envision that the ADA would be applied [in suggested manner]," . . . *in the context of an unambiguous statutory text that is irrelevant*. . . . [T]hat a statute can be " 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. *It demonstrates breadth*.' "

Yeskey, 524 U.S. at 212 (citations omitted) (emphasis added); *accord CarParts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England*, 37 F.3d 12, 19-20 (1st Cir. 1994); *cf. United States v. Baird*, 85 F.3d 450, 454 (9th Cir. 1996) (convenience store with two video games is "place of entertainment" and thus a public accommodation under Civil Rights Act, even though games are not substantial part of store's business), *cert. denied*, 519 U.S. 995 (1996).

Petitioner next attempts to manufacture an important federal issue for review by formulating a new argument that was not presented to and therefore not addressed by the Ninth Circuit. Petitioner artfully deletes from the petition all references to the statutory terms "facilities, privileges, advantages, or accommodations" from the broad statutory list of benefits Congress sought to ensure were equally available to persons with disabilities (42 U.S.C. § 12182(b)(2)(A)(ii)). Pet. at 14. Having unilaterally pared the statutory protections down to "goods and services," petitioner argues that granting relief to Mr. Martin under Title III somehow encroaches on Title I's prohibition against "discrimination in the private workplace." *Id.* at 10.

As an initial matter, petitioner's failure to raise this argument in the district court or the Ninth Circuit precludes its assertion here. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 n.3 (1999) (Supreme Court will not consider argument that was not raised or considered below). In addition, petitioner does not contend that this purported aspect of the Ninth Circuit's decision conflicts with any decision of this Court or any circuit court. Petitioner merely asserts the Ninth Circuit's decision reflects "an awkward reading of Title III." Pet. at 14. The argument is also meritless.

Title III grants equal access and enjoyment of different and often broader areas than Title I's employment-related provisions: Title III grants to "individuals" full and equal access to the "goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). Petitioner would introduce an unprecedented exception into the unambiguous language of Title III (which provides protection to all "individuals") and limit protection to spectators at a public event but permit discrimination against individuals seeking to earn money while using the "goods, services, facilities, privileges, advantages, or accommodations" of a public accommodation. Pet. at 14.

The Third Circuit recently rejected this same "blanket interpretation that Congress intended Title III to apply only to members of the public." *Menkowitz*, 154 F.3d at 121. Employing reasoning equally responsive to petitioner's contention that Title III applies only to spectators at PGA events, the Third Circuit held:

> Equally unavailing is the hospital's argument that illustrations cited by the ADA's legislative history all describe instances of members of the public as clients or customers. That a statute can be "applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." . . . Nor can we agree with the hospital's argument that Title III offers no protection against disability discrimination by virtue of the appellant's "unique business relationship" with the hospital. This contention runs contrary to the plain language and legislative history of Title III which in no way mentions any sort of "business relationship" that would preclude an "individual" from asserting a cause of action if denied the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation."

Id. (citations omitted).

Petitioner's view would forfeit the protections of anti-discrimination laws for a host of individuals who currently enjoy full and equal access to public accommodations. For example, an "auditorium," a "museum" and a "private school" are places of public accommodation (42 U.S.C. §§ 12181(7)(D), (H) & (J)), and do not cease to be for an invited speaker who is paid a fee as an "independent contractor." Petitioner posits that members of the public attending the lecture are protected, but the guest speaker can be discriminated against on the basis of disability. Similarly, petitioner would withhold anti-discrimination protection from a game show contestant competing for prize money before a studio audience, even though Title III unambiguously applies to all places of "exhibition or entertainment." 42 U.S.C. § 12181(7)(C). But Congress extended the protections of Title III to all "individuals" at public accommodations, regardless of Title I's potential applicability, and this is how the statute is being consistently applied across the country. *See, e.g., Menkowitz*, 154 F.3d at 118-23; *CarParts*, 37 F.3d at 19-20.

As the Ninth Circuit held, competitors in PGA events necessarily are members of the "public" whom the PGA has admitted to its courses. App. 7a. The record showed that:

> Any member of the public who pays a $3000 entry fee and supplies two letters of recommendation may try out in [petitioner's] qualifying school. At the initial stage, it seems plain that the golf course on which the elimination begins is a place of public accommodation. As even the PGA admits, "[t]he competition areas of some amateur sporting events may well constitute places of public accommodation under Title III of the ADA when virtually any

> member of the public can participate." We fail to see, however, why a winnowing process would change the nature of the facility. . . .

Id. at 7a-8a.

Petitioner argued in the district court that it was *entirely exempt* from Title III of the ADA as a private club. The district court rejected this contention, "because, among other reasons, it is a commercial enterprise offering athletic events to the public." *Id.* at 3a n.5; *see also id.* at 44a-51a.[4] Although petitioner did not challenge this ruling in the Ninth Circuit or here, at bottom it continues to seek a license to discriminate. Accepting petitioner's argument that Title III does not apply to it would "render[ ] the private club exemption virtually irrelevant," *id.* at 53a, and would grant the PGA free rein to discriminate "inside the ropes" not only on the basis of any disability, but on the basis of race or religion. The PGA's counsel acknowledged this before the district court. Resp't App. 1a-3a. The Ninth Circuit foreclosed this result by applying Title III according to its terms, consistent with all relevant precedent.

B. The Ninth Circuit Held Only That Based On The Full Record Developed At Trial, The District Court Properly Found That Mr. Martin Was Entitled To Relief Under Title III Of The ADA

Petitioner misstates the Ninth Circuit's holding and analysis under Title III to argue that the Ninth Circuit sweepingly required "professional sports organizations to grant waivers of their substantive rules of competition to accommodate disabled competitors." Pet. at 19. Similarly, seeking to create the impression that *Martin* has broad ramifications, petitioner

4. Petitioner is a lucrative commercial enterprise employing hundreds of persons and has annual revenues of over $300 million. Its assets include golf courses which it owns, leases and operates and on which it conducts professional golf tournaments. *See* Resp't App. 36a-39a; App. 2a.

mischaracterizes the nature of Mr. Martin's claim under the ADA as an outright "challenge . . . to one of the competitive rules applicable to certain golf tournaments." *Id.* at 2. Mr. Martin did not seek and the Ninth Circuit did not grant such broad relief. Rather, Mr. Martin challenged the petitioner's discriminatory conduct toward him in failing to comply with the ADA's mandate that it reasonably accommodate his permanent disability. The Ninth Circuit clarified that its holding, which was expressly based on the unique factual record developed at Mr. Martin's trial, carried no such broad significance:

> The nature of the district court's findings reflect the fact that whether an accommodation fundamentally alters a competition is an intensively fact-based inquiry. For that reason, we reject PGA's argument that permitting Martin to use a golf cart would open the door to future decisions requiring that disabled swimmers or runners be given a head start in a race. . . . We have little doubt that fact-based inquiries into the effects of such accommodations would result in rulings that those accommodations fundamentally altered the competitions.

App. 12a.

The Ninth Circuit simply affirmed as "not clearly erroneous" (*Id.*) the district court's findings of fact made after a six-day bench trial under the individualized inquiry mandated by the ADA. Title III of the ADA broadly provides that any private entity that owns, leases or operates a "public accommodation" must make a "reasonable modification" of its "policies, practices, or procedures" when necessary to make its "goods, services, facilities, privileges, advantages, or accommodations" available to individuals with disabilities, unless such modification would "fundamentally alter the nature"

of its "goods, services, facilities, privileges, advantages or accommodations." 42 U.S.C. § 12182(b)(2)(A)(ii).[5]

Because the PGA conceded that Mr. Martin has a disability, Mr. Martin's only burden was to show that a reasonable modification was requested. *See, e.g., Johnson*, 116 F.3d at 1059. Petitioner has never contested the reasonableness of a cart as an accommodation that will permit Mr. Martin to participate in the "goods, services, facilities, privileges, advantages, or accommodations" offered by petitioner. App. 9a. Consistent with uniform authority under the ADA, the Ninth Circuit held that the ADA required the PGA to permit the modification unless it could prove that, in view of Mr. Martin's individual circumstances, the modification would fundamentally alter the nature of PGA Tour golf competition. App. 10a; *accord Johnson*, 116 F.3d at 1060 (Title III analysis "focuses on the specifics of the plaintiff's or defendant's circumstances and not on the general nature of the accommodation"); *Crowder v. Kitagawa*, 81 F.3d 1480, 1486 (9th Cir. 1996) ("the determination of what constitutes reasonable modification is highly fact-specific, requiring case-by-case inquiry"); *Staron v. McDonald's Corp.*, 51 F.3d 353, 356 (2d Cir. 1995) ("it is clear that the determination of whether a particular modification is 'reasonable' involves a fact-specific, case-by-case inquiry"); *D'Amico v. New York State Bd. of Law Examiners*, 813 F. Supp. 217, 221 (W.D.N.Y. 1993) ("the most important fact that the Court must consider in determining the reasonableness of the . . . accommodations is the nature and extent of plaintiff's disability"); *see also* 29 C.F.R. pt. 1630, app. § 1630.9 (process of determining appropriate reasonable accommodation requires individual assessment of particular job at issue and the specific limitations of the particular person in need of the reasonable accommodation).[6]

5. Petitioner totally avoids discussing the governing statutory phrase — "reasonable modifications." 42 U.S.C. § 12182(b)(2)(A)(ii). Through this technique, petitioner misdescribes the Ninth Circuit's opinion as requiring "waiver" (as opposed to "reasonable modification") of a "substantive rule." *See, e.g.*, Pet. at 2, 8-9, 11, 21, 24. Petitioner's attempt to divert this Court from *Martin*'s actual and proper analysis only underscores the absence of any genuine issue requiring this Court's authoritative guidance. *See infra* pp. 16-24.

The individualized inquiry employed by the Ninth Circuit and other courts accords with the individualized approach endorsed by this Court when evaluating a proposed accommodation under the Rehabilitation Act of 1973, the civil rights statute the ADA was modeled after and which this Court has held should be interpreted consistently with the ADA. *Bragdon*, 524 U.S. at 638. This Court has instructed:

> [T]he district court *will need to conduct an individualized inquiry and make appropriate findings of fact*. Such an inquiry is essential if § 504 [of the Rehabilitation Act] is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to [any countervailing considerations].

School Bd. of Nassau Co. v. Arline, 480 U.S. 273, 287 (1987) (emphasis added). Significantly, the Seventh Circuit (the court petitioner contends has repudiated individualized inquiry under the ADA) recently quoted this language from *Arline* in reaffirming the appropriateness of evaluating the individual

6. *Accord Matthews v. NCAA*, 79 F. Supp. 2d 1199, 1204 (E.D. Wash. 1999) ("When any court applies the ADA, it must examine the facts specific to the case and the disabled individual's circumstances, and the accommodations that might allow him to participate."); *Stillwell v. Kansas City, Mo. Bd. of Police Comm'rs*, 872 F. Supp. 682, 687 (W.D. Mo. 1995); *cf. Anderson v. Gus Mayer Boston Store of Del.*, 924 F. Supp. 763, 781 (E.D. Tex. 1996) ("The legislative history of [Title I of] the ADA recommends that the disabled person be consulted about what a reasonable accommodation might be to avoid employers overstating costs.").

circumstances of a plaintiff alleging an ADA claim. *Washington v. Indiana High Sch. Athletic Ass'n*, 181 F.3d 840, 851 (7th Cir.), *cert. denied*, 120 S. Ct. 579 (1999). Petitioner relegates to a footnote its citation to *Washington*, and there does not even acknowledge the Seventh Circuit's specific adoption of an individualized inquiry. *See also infra* Point B(2).

1. *The Ninth Circuit's Holding Was Expressly Based On Specific Factual Findings Supporting The Conclusion That Golf Is A Game Of Shot Making, Not Walking*

The petition reads as if the Ninth Circuit's conclusions under the ADA were judicial fiat based on "guesswork." Pet. at 22; *see also id.* at 8, 21. In fact, each of the Ninth Circuit's conclusions was expressly based on evidence admitted at the six-day bench trial conducted by the district court. Remarkably, the petition does not even acknowledge that the findings were made by the district court and affirmed by the Ninth Circuit under the appropriate clearly erroneous standard.

The record demonstrated that the Rules of Golf are the recognized fundamental rules of the game; as the immediate past president of the USGA testified, "[i]f you want to play golf, you need to play by these rules." Resp't App. 18a. Although it is nowhere found in the petition, the Ninth Circuit noted that the definition of the game set forth in the Rules of Golf makes it clear that the essence of the game is shot-making:

> Rule 1. The Game.
>
> 1-1. General.
>
> The Game of Golf consists in playing a ball from the teeing ground into the hole by a stroke or successive strokes in accordance with the Rules.

Id. at 59a; App. 9a. Significantly, the Ninth Circuit and the district court relied on evidence establishing that the Rules of Golf do not prohibit the use of carts or require players to walk. App. 9a. The PGA Commissioner acknowledged that "the essentials" of the game of golf are contained in Rule 1-1 of the Rules of Golf, *id.* at 23a; *see also id.* at 17a-18a, and that "the key element of skill in the game of golf is shot-making." *Id.* at 28a. Petitioner was unable to produce any document stating directly or indirectly that walking is fundamental to competitive golf.[7] *Id.* at 22a-23a.

With limited exception, the only way a player can obtain the right to participate in the PGA or Nike Tour is to "qualify" at the annual qualifying event, called the "Q School." *Id.* at 40a-58a. For 30 years the PGA rules permitted players to use carts in all three stages of the Q School. There was no evidence that over the course of 30 years any player or PGA official *ever* complained that a player who chose to use a cart had an advantage over those players who chose to walk.[8]

Second, as the Ninth Circuit observed, petitioner, outside this lawsuit, regularly rebuts its contention that walking is fundamental to PGA golf by applying exceptions that permeate its must-walk rule:

- Every golfer who advances to the third stage of Q School is assured of a place on either the PGA or

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7. The Rules of Golf provide a model *optional* condition for a competition to include if the competition wishes to require players to walk. The PGA did not adopt such optional condition for its competitions. The conditions of competition adopted by the PGA specifically provide for exceptions to the must-walk rule. *Id.* at 18a-20a, 59a-60a, 62a-63a.

8. Only in 1997, the year Mr. Martin played in the qualifying rounds of the Q School, did the PGA for the first time require players to walk in the final stage unless an exception was granted.

Nike Tour. *Id.* at 25a-26a, 34a-35a. Yet the PGA still does not require any golfer to walk in the first two qualifying stages when testing the skills of players who will become Tour members. *Id.* at 5a-7a, 16a-17a, 21a-22a, 40a-58a.

• A player can also earn the right to play in a single PGA event on the PGA and Nike Tours as an exempt entry by playing in the open qualifying event for that tournament and being one of the four lowest-scorers in that event. Carts are permitted for such events. *Id.* at 24a-25a, 29a-33a.

• The PGA routinely permits all players-to ride in carts during PGA and Nike Tour competition for administrative convenience, including when players retrieve a ball hit out of bounds, when a lengthy distance separates a green and the next tee and sometimes during play of an entire hole. *Id.* at 4a-5a, 61a.

• The PGA permits carts and does not require walking on its highly competitive Senior Tour, which has been called "the most successful professional sports venture of the 1980s." *Id.* at 7a-16a.

• The PGA admits that carts have been a part of the game of golf for 30-40 years. *Id.* at 28a.

Petitioner argues that it has adopted a rule requiring players to walk and that it cannot be required to modify this rule in any manner because "high-level athletic competition requires that competitors be tested under the same rules." Pet. at 21. A change in any rule, petitioner contends, could

hypothetically confer a competitive advantage to certain golfers. The Ninth Circuit noted that petitioner regularly disproves this contention by its own conduct. For example:

• The PGA permits golfers who walk to compete against golfers who use carts in (i) Q School, (ii) the weekly qualifying tournaments, and (iii) the Senior Tour.

• The PGA rules provide no handicap or penalty for players who use carts.

See App. 10a; Resp't App. 24a-25a, 29a-33a. Petitioner has never questioned the integrity of any of these competitions.

Consistent with the case-by-case inquiry mandated by the ADA, the Ninth Circuit did not "guess" whether permitting Mr. Martin to use a cart would "fundamentally alter" PGA tournament golf. Rather, it addressed the factual record developed in *Martin* showing that golf is not a race against the clock or against human endurance, and that "[t]he central competition in shot-making would be unaffected by Martin's accommodation" (App. 10a-11a):

> The district court found that the purpose of requiring players to walk was to inject a fatigue factor into the shot-making of the game. *It also found, however,* that "the fatigue factor injected into the game by walking the course cannot be deemed significant under normal circumstances." *It further found* that, at the low levels of intensity of exercise involved in untimed walking of a golf course during a competition, "fatigue . . . is primarily a psychological phenomenon. . . . Stress and motivation are the key ingredients here." The court noted that, *given the choice of carts or walking in other tours, large numbers of players*

> *chose to walk.* . . . Against this background, the district court evaluated whether use of a cart would give Martin an advantage over the other players who were required to walk.

Id. at 10a (citations omitted & emphasis added).

The Ninth Circuit observed that the fact-intensive issue of whether permitting *Mr. Martin* to use a cart would fundamentally alter the nature of PGA golf competition also was "*fully tried* in the district court." *Id.* (emphasis added). The court summarized the evidence admitted at trial concerning the nature and extent of Mr. Martin's disability, and how it affects his ability to walk a golf course, and agreed with the district court's *finding* "after considering these factors . . . that Martin 'easily endures greater fatigue even with a cart than his able-bodied competitors do by walking.' " *Id.* The court specifically noted "[t]here was ample evidence to support all of these findings, and they are not clearly erroneous." *Id.*[9]

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9. Unable to point to any real conflict, petitioner strains to analogize *Martin* to inapposite cases holding that maximum age or semester requirements in high school sports cannot be waived without upsetting the competitive balance of high school athletics. Pet. at 23 n.26. As the Ninth Circuit concluded, these cases present issues not involved here. The "foundation of these cases . . . was a finding, or evidence compelling a finding," that the eligibility requirements sought to be modified for disabled students — unlike the walking rule in the present case — were closely fitted with the purpose of athletic competition involving teenagers still growing up. App. 13a. *See, e.g., Sandison v. MHSAA*, 64 F.3d 1026, 1035 (6th Cir. 1995) (age maximum is a "necessary" regulation in high school sports because it "safeguards against injury" and "prevents any unfair competitive advantage"); *Pottgen v. MSHSAA*, 40 F.3d 926, 929 (8th Cir. 1994) (age maximum is essential element of high school team sports because it "reduc[es] the competitive advantage flowing to teams using older

(Cont'd)

The Ninth Circuit astutely recognized that "[t]he mere fact that the PGA has defined walking to be part of the competition cannot preclude inquiry, or PGA will have been able to define itself out of the reach of the ADA." App. 12a. Petitioner's misplaced emphasis on whether it has declared one of its rules "substantive" — a term not employed in the ADA, *Martin* or even *Olinger* — is an effort to avoid the plain language of the ADA. The Ninth Circuit exposed the fatal flaw in petitioner's argument that once it unilaterally deems a rule substantive, the rule is insulated from any accommodation that could permit a person with a disability to participate. "The difficulty with this position is that it reads the word 'fundamentally' out of the statutory language, which requires reasonable accommodation unless PGA can demonstrate that the accommodation would 'fundamentally alter the nature' of its competition." *Id.* at 11a (quoting 42 U.S.C. § 12182(b)(2)(A)(ii)).

If petitioner's view were adopted, the PGA would effectively elevate professional sports beyond the reach of Congress, no matter how great a barrier to participation a given rule poses, no matter how insignificant the rule to the competition, and no matter how reasonable the modification requested. As the district court accurately observed,

> the PGA Tour's contention that it may alone set the rules of competition, and that any modification of any of its rules (which may be necessary to accommodate the disabled) fundamentally alters the nature of PGA tournaments, is simply another version of its argument that the PGA Tour is exempt from the provisions of the ADA.

(Cont'd)

athletes; protects younger athletes from harm; discourages student athletes from delaying their education to gain athletic maturity; and prevents over-zealous coaches from engaging in repeated red-shirting to gain a competitive advantage").

App. 23a. The district court noted:

> the ADA does not distinguish between sports organizations and other entities when it comes to applying the ADA to a specific situation. . . . the disabled have just as much interest in being free from discrimination in the athletic world as they do in other aspects of everyday life.

Id. at 24a.[10]

The Ninth Circuit properly enforced the ADA's requirement that all organizations subject to the ADA modify their rules to permit full participation by people with disabilities. The ADA's mandate has required organizations to make significant changes not only to rules of style, but to the way they do business.[11] To argue that in sport the rules

10. Moreover, professional sports organizations including the NBA, the NFL, the NHL and Major League Baseball appeared before Congress during its consideration of the ADA. None of these organizations suggested that the ADA would not apply to them. Instead, they sought guidance from Congress concerning whether drug-testing programs for *players* would comply with the ADA. *See* H.R. Rep. No. 101-485 pt. 2, at 80-81 (1990), *reprinted in* 1 Staff of House Comm. on Educ. and Labor, 101st Cong., *Legislative History of P.L. 101-336, The Americans with Disabilities Act*, at 353-54 (1991).

11. For example, after challenges under the ADA, Burger King agreed to develop an electronic device to enable hearing-impaired people to order drive-through food, and a bar review course agreed to provide sign language interpreters and braille materials. Sullivan, *The Americans with Disabilities Act of 1990: An Analysis of Title III and Applicable Law*, 29 Suffolk U.L. Rev. 1117, 1135-36 (1995); *D'Amico*, 813 F. Supp. at 223-24 (requiring Board to allow person with disability four days to complete bar exam); *see also Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237 (11th Cir. 2000) (Title III applies to cruise ships in U.S. waters); *cf.* 42 U.S.C. § 12101(a)(5) (discrimination against persons with disabilities includes "failure to make modifications to existing facilities and practices").

themselves are what is fundamental to the enterprise is to try to define sport as exempt from the ADA — and to do so in an insidious way. If no rule of competition, regardless of its purpose, can be modified to permit participation by people with disabilities, then — ironically — sport would become the only industry in America permitted to construct barriers to access that are unrelated to performance. If a player qualifies by demonstrating exceptional ability in the sport's essential skills, that he has a permanent disability unrelated to the sport's essentials should not exclude him from using that ability. It bears emphasis that professions with weightier responsibilities to society, such as the medical profession, have accommodated persons with learning and other disabilities by, for example, allowing additional time to take exams, to give them the opportunity to participate in these important professions. *See, e.g., Menkowitz*, 154 F.3d at 122 ("medical doctor with staff privileges . . . may assert a cause of action under Title III of the ADA"); U.S. Dep't of Justice, Civil Rights Division, The Americans with Disabilities Act: Title III Technical Assistance Manual ¶ 4.1100, illus. 4 (Nov. 1993) (same); *Agranoff v. Law School Admission Council, Inc.*, 97 F. Supp. 2d 86, 88 (D. Mass. 1999) (time and a half to complete Law School Admissions Test is reasonable accommodation); *D'Amico*, 813 F. Supp. at 224 (plaintiff may take bar examination over four days rather than the usual two).[12]

12. Congress enacted the ADA understanding that discrimination against people with disabilities manifests itself in a variety of ways. 42 U.S.C. § 12101(a)(3)-(5). In addition to blatant discrimination born of malice, people with disabilities have been unintentionally but routinely deprived of the opportunity to participate in a variety of activities because of facially neutral rules or procedures that have the effect of excluding the disabled. Congress specifically foreclosed retreat to "facially neutral" rules, and rejected attempts to justify exclusion based on disability because "the rules are the rules." *See, e.g., Crowder*, 81 F.3d at 1484 (Title III requires modification of state law animal

(Cont'd)

The Ninth Circuit did not purport to change the rules of golf; it only enforced the ADA's mandate that an otherwise qualified competitor must be allowed to *get to the game*. App. 11a ("All that the cart does is permit Martin access to a type of competition in which he otherwise could not engage because of his disability.").

2. *The Ninth Circuit's Decision Does Not Conflict With Olinger*

Petitioner's obligatory assertion that the Ninth Circuit's ruling based on the unique record before it is "squarely contrary" (Pet. at 9) to *Olinger* is rebutted by reference to both *Martin* and *Olinger*. The Ninth Circuit acknowledged the *Olinger* district court opinion (subsequently affirmed by the Seventh Circuit) and stated that the detailed factual findings made by the *Martin* district court "distinguishes Martin's case from *Olinger*, . . . in which the district court found *on the evidence there presented* that use of a cart can provide a golfer with a competitive advantage over a golfer who walks." App. 13a-14a n.9 (emphasis added). Similarly, the Seventh Circuit acknowledged the district court decision in *Martin*, but never suggested that its holding was inconsistent with *Martin*. *Olinger*, 205 F.3d at 1003-04. Thus, any differences in the decisions arise from differing factual records, not from conflicts on the law.

The district court opinion affirmed by *Olinger* confirmed even more directly the lack of any conflict with *Martin*:

> A word should be added about the *Martin* case. . . . *this case is different from the Martin case*. First, this

(Cont'd)
quarantine requirement; although the "requirement applies equally to all persons entering the state with a dog, its enforcement burdens visually-impaired persons in a manner different and greater than it burdens others"); *Thomas v. Davidson Academy*, 846 F. Supp. 611, 619 (M.D. Tenn. 1994) (ADA forecloses "blind adherence to policies and standards resulting in a failure to accommodate a person with a disability").

> case focuses on a single event, not a series of multi-level weekly tournaments. Further the parties in *Martin* presented different evidence, so the records differ. For example, the *Martin* court cited the testimony of Dr. Gary Klug with some frequency; this court granted the USGA's motion to exclude Dr. Klug's testimony. . . .

Olinger, 55 F. Supp. 2d at 933 n.4 (emphasis added).

Petitioner misreads *Olinger* to contend that the Seventh Circuit and district court there did not undertake an individualized inquiry. This contention does not survive a reading of *Olinger*. The *Olinger* district court stated that "[a] court deciding a case under the ADA *must make an individualized decision* concerning the plaintiff." *Id.* at 937 (emphasis added). Consistent with the analysis undertaken in *Martin*, the Seventh Circuit affirmed the *Olinger* district court, examining: (1) "the 'nature of the "program" to which Mr. Olinger seeks access: the U.S. Open' " and (2) whether granting the requested accommodation "would alter the fundamental nature of *that competition*," *i.e.*, the U.S. Open, not the continual succession of tournaments over the course of nearly a year, to which Mr. Martin sought access based on a different factual record. *Olinger*, 205 F.3d at 1006 (emphasis added); *see also Olinger*, 55 F. Supp. 2d at 937 ("As noted before . . . it is also important to remain focused on the nature of the 'program' to which Mr. Olinger seeks access: the U.S. Open."). Petitioner nowhere acknowledges the important distinctions recognized in *Olinger* between (a) the U.S. Open, a single tournament comprising 72 holes of golf (usually played over four days) (*Olinger*, 55 F. Supp. 2d at 928), and (b) the nearly year-long succession of tournaments around the nation in which PGA or Nike Tour members compete.

The Seventh Circuit also noted that "[t]he focus of our opinion has been on *one* question: Must the *USGA* allow *Ford Olinger* to

compete while riding in a golf cart instead of walking?" *Olinger*, 205 F.3d at 1007 (emphasis added). It expressly based its ruling on the *Olinger* factual record, which was a substantially different record than the record developed at the *Martin* trial. Acknowledging that the accommodation of a cart was "reasonable in a general sense" (*Id.* at 1006),[13] the Seventh Circuit nevertheless agreed with the district court's conclusion that the lay and expert testimony admitted in *Olinger* justified denying Mr. Olinger's request to use a cart in the U.S. Open. This fact-specific holding was expressly based on the Seventh Circuit's endorsement of the district court's comprehensive factual "findings [that] are amply supported in the record." *Olinger*, 205 F.3d at 1006. In addition to crediting testimony from golfers concerning the role physical stamina had played in certain U.S. Opens, the Seventh Circuit emphasized that "Olinger's own expert witness . . . likewise testified that physical endurance and stamina and uniform rules are critical factors. . . ." *Id.* at 1006. Thus, far from announcing any broad split with the Ninth Circuit, the Seventh Circuit simply affirmed a district court holding based on findings of fact made "after a full trial" in which the evidence received was quite different than the evidence heard by the court in *Martin*. *Id.* at 1004.

Any doubt as to whether the Seventh Circuit employs the same "individualized inquiry" employed under the ADA by the Ninth Circuit and other courts is conclusively dispelled by the Seventh Circuit's recent unambiguous adoption of that inquiry:

> We think that the individualized approach is consistent with the protections intended by the ADA. The entire point of *Arline*'s statement that a person is otherwise qualified if he is able to participate with

13. *See also Olinger*, 55 F. Supp. 2d at 934 ("The USGA does not appear to challenge the reasonableness of Mr. Olinger's requested accommodation in a general sense, and the golf cart has become so ubiquitous in the sport that any such challenge would seem doomed.").

> the aid of reasonable accommodations is that some exceptions ought to be made to general requirements to allow opportunities to individuals with disabilities.

Washington, 181 F.3d at 851. Petitioner is suggesting that a few months later the *Olinger* panel rejected this holding without even citing *Washington* or acknowledging its departure from prior case law. Even if petitioner were correct that *Olinger* rejected " 'individualized determination' " (Pet. at 22), the conflict would be between different panels of the same circuit and should be resolved by the Seventh Circuit. *See, e.g., Davis v. United States*, 417 U.S. 333, 340 (1974).

Subsequent to *Martin* and *Olinger*, the United States District Court for the Western District of Texas entered a preliminary injunction under Title III of the ADA requiring the USGA to permit a professional golfer suffering from Post Polio Syndrome to use a cart in the United States Senior Open and its qualifying round. *See Jones v. United States Golf Ass'n*, Civ. No. A-00-CA-278 JN (W.D. Tex. June 15, 2000), App. 64a-67a. The court concluded that "[u]pon review of the ADA and the relevant cases, particularly *Martin* . . . *Olinger* . . . and *Johnson v. Gambrinus Co.*, 116 F.3d 1052 (5th Cir. 1997), the Court finds that Plaintiff has demonstrated a substantial likelihood of success on the merits." Referencing *Martin* and *Olinger* together, the *Jones* court never suggested any inconsistency existed between those circuit court decisions.

Simply stated, it is reasonable to expect that if the Seventh Circuit, the Ninth Circuit, the district court in *Olinger* or the district court in *Jones* had perceived a conflict between *Martin* and *Olinger*, at least one of those courts would have said so.

C. This Case Does Not Have Far-Reaching Implications

While petitioner perfunctorily declares that the Ninth Circuit's decision may have far-reaching consequences for professional sports (Pet. at 24-25), in reality the decision is a fact-specific ruling with no general application beyond its effect on the litigants, and arguably the small group of professional golfers who compete in PGA-sponsored golf tournaments. The Seventh Circuit noted in *Olinger* that since 1986 only eleven golfers have requested permission to use a cart in the U.S. Open — fewer than one a year. *Olinger*, 205 F.3d at 1003. Moreover, petitioner does not dispute that the group of individuals who possess the talent to compete even in the PGA's qualifying rounds is minuscule. App. 48a ("The Tour contends that . . . only very few golfers possess the requisite skills to become members of the Tour and compete at its events").

Petitioner contends that the modification requested by Mr. Martin will fundamentally alter PGA golf without ever considering the nature and extent of his disability — facts it deems irrelevant. *Id.* at 13a ("PGA has steadfastly declined to consider Martin's condition in adhering to its position"). Having refused even to look at Mr. Martin's medical records, petitioner conclusorily asserts that the case-by-case evaluation of disability mandated by the ADA would not result in "reliable" determinations of whether an individual "might obtain an unfair advantage." Pet. at 22. First, organizations across the country are complying with the ADA by consulting physicians and medical records to determine how persons with disabilities can reasonably be accommodated so that they may fully participate in various aspects of life. *See, e.g., Rascon v. U.S. West Comm., Inc.*, 143 F.3d 1324, 1327 (10th Cir. 1998) (discussing communications between U.S. West and employee's physicians in attempting to accommodate employee's post-traumatic stress); *Davis v. Lockheed Martin Operations Support*, 84 F. Supp. 2d 707, 712 (D. Md. 2000) (employer complied with ADA where it engaged in extensive communications with employee about her disability and provided

her with every accommodation her doctor said she needed); *Darian v. University of Massachusetts Boston*, 980 F. Supp. 77, 88 (D. Mass. 1997) (school met its obligation to make reasonable accommodation to disabled student under ADA by, *inter alia*, consulting doctor).

Moreover, as the Ninth Circuit noted, "[n]othing in the record establishes that an individualized determination would impose an intolerable burden on PGA." App. 14a. Petitioner fails to acknowledge that it already makes these individualized determinations pursuant to a medical extension rule for PGA members who miss certain events because of a medical condition. Its Commissioner testified that the PGA reviews a PGA or Nike Tour player's medical condition — which petitioner refused to do in Mr. Martin's case — and generally accepts a treating physician's conclusion that the player missed tournament play for medical reasons. Petitioner then permits this *temporarily* disabled player to return to the Tour (to the extent determined by a formula) *without having to return to Q School,* which petitioner concedes gives the exempt player an advantage on the basis of disability over those who must qualify.[14] Resp't App. 26a-27a. Thus, petitioner is already evaluating the medical condition of golfers and is willing to make judgments about the effect of even a temporary disability on the ability to play for one of its own. The Ninth Circuit correctly held that the ADA prohibits petitioner from refusing to exercise its demonstrated ability to evaluate golfers with disabilities when the request is from a golfer seeking to play on a tour.

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14. Petitioner's speculative hypotheticals about golfers who do not have a disability but who are not at their physical best on a given day (Pet. at 23) are entirely beside the point. The ADA does not protect individuals with temporary ailments, and does not cover the average person ill from the flu or incapacitated by short term surgery for a hangnail. 29 C.F.R. § 1630.2(j); 29 C.F.R. pt. 1630, app. § 1630.2(j) (interpreting § 1630.2(j)).

This case simply does not present any issue of national importance warranting this Court's review. Rather, the decision reflects the proper application of settled legal principles to a fully developed factual record unique to Mr. Martin.

Finally, even if the petition could be deemed to raise an issue that may ultimately warrant review, the broader significance and recurring nature of any issue presented by the Ninth Circuit's decision are far from established. Accordingly, sound judicial administration supports this Court awaiting further developments in the lower courts to allow the Court to (a) ascertain whether any national issue warranting a writ exists and (b) properly frame the nature and extent of any such issue. *See, e.g., McCray v. New York*, 461 U.S. 961, 963 (1983) (certiorari denied where issue requires "further study" in lower courts "before it is addressed by this Court").

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — EXCERPTS FROM TRIAL TRANSCRIPT

[commencing at page 21]

Argument – Defendant

* * *

THE COURT: Well, if you are exempt from the ADA, you are also exempt from the Civil Rights Act, correct?

MR. MALEDON: That's correct. They are one and the same. The test is the same, and that is correct.

THE COURT: And not that the PGA Tour would ever do this, but hypothetically, then, you would be arguing that you could lawfully ban golfers based on race or religion?

MR. MALEDON: Any private organization unfortunately, Your Honor, can do that, and the PGA Tour has never done that.

THE COURT: I'm not saying you did or you would.

MR. MALEDON: Yes.

THE COURT: But hypothetically, if the private [22] club exemption applies to you, you would also assert that you could lawfully do that.

MR. MALEDON: Your Honor is hypothetically correct that that is true as to any private organization, a country club, a — the Boy Scouts, anybody that qualifies for an exemption

as a private membership organization, that is correct, Your Honor, they are exempt from the civil rights laws. In my view that's — that's one of the unfortunate aspects of what Congress did, but that's what they did, and that's what the law is. So Your Honor is correct.

THE COURT: And you don't think that the participation of the public in the PGA Tour and what they do in terms of generating economic benefits for its members would be such that the courts would not deem PGA Tour to be private under the Civil Rights Act?

MR. MALEDON: No, Your Honor. No, Your Honor, not any more than the same thing is true with respect to the Boy Scouts and the money that they raise. I submit that the Boy Scouts of America probably have as much if not more assets than the PGA Tour, but nevertheless, the courts have held that they are a private organization exempt from the Civil Rights Act.

* * *

[76] . . . The fact of the matter is that with respect to a private membership organization and that issue, the law is clear, and, indeed, I would refer Your Honor to the ***Chicago Club*** case we cited where the court says, "The club allows nonmember guests the use of its facilities under certain conditions and under the sponsorship of a member. Members may arrange for guests to be issued a guest card

that affords them the use of club facilities for as many as 14 days." The court said that didn't take away the indicia of a private membership organization. The mere fact that you have guests is to be expected in private membership organizations.

Some of these participants I guess would fall into the category of guests, but the fact of the matter is most of the rest of them are members of one kind, and it is not unusual, as we said in our papers, Your Honor, for private clubs to have different kinds of members. Kinds of members.

Your Honor, you asked Ms. Walters about the handicapped caddie situation, and categorically I disagree. The handicapped caddie would not have to be accommodated, again, because it is not a place of public accommodation where the handicapped caddie is. It is not an area that is open to the general public.

* * *

[119] D. Jones ReD

* * *

BY MR. WISWALL:

Q. In the event of the amputation, would it be below or above?

[120] A. If it was necessary today, it would be below the knee, but there's a possibility with the changes in his knee it would eventually be above the knee, as well.

* * *

[222] E. Johnson — D

* * *

Q. Now, there may be some testimony in this case that officials of the PGA Tour can transport players who have hit a ball out of bounds or who have lost their ball back to the tee to hit their next shot and then back again.

A. Yes.

Q. Have you seen that?

A. I've seen that and been involved in that.

Q. All right. So — So it's just not that there can be shuttles between green and tee where there's a long distance, but if you've lost your ball and you are in the play of the game, right in the middle of the hole, and you've hit a 285-yard shot, you've lost your ball, you can't find it, an official can take you back by automated cart and take you back to the tee; is that correct?

A. That is correct.

Q. Then you hit your ball, and let's say that you fire this one straight down the fairway. Can the official then take you right back down to the ball that you've hit?

A. That's his discretion, but in most cases they will, yes.

* * *

[434] R. Ferris — D

* * *

Q. Now, Mr. Ferris, you were chairman of the policy board in 1997; is that correct?

A. That is correct.

Q. In 1997, Mr. Ferris, did an issue arise concerning whether competitors in the finals of the PGA Tour qualifying tournament would be required to walk?

A. That was one of the subjects that came up regarding the qualifying tournament.

Q. All right. And was it always the case, Mr. Ferris, that prior to 1997 that competitors in the PGA Tour qualifying tournament were required to walk?

A. Would you repeat that, please.

Q. Sure. Prior to 1997, sir, was it required that competitors in the PGA Tour qualifying tournament walk the course?

A. To the best of my knowledge, it was not required.

Q. All right. And what happened in 1997 at the board level, Mr. Ferris, that brought about a change in that requirement?

A. The feel was on the part of staff and was brought to [435] the board — by staff, I mean the commissioner and the staff — was brought to the board that they wanted to make some improvements to the final stages of the qualifying tournament and, to the best of their ability, to approximate playing conditions as encountered — that the players would encounter at the — out on tour, out on the PGA Tour once they got their card and they would be out on tour. And so they took a number of actions, and which the board approved, to — to create a situation where we mirrored PGA Tour-like conditions at qualifying school, and I believe that one of those actions was to cease to have the use of carts and to put in place that in the finals, I think it's the final, that you must walk.

There were a number of other things done, too.

Q. What's your understanding, Mr. Ferris, as to why competitors in the qualifying tournament in prior years were not required to walk the course?

A. It was a matter of basically practicality. And for the most part, economic practicality. The qualifying tournament is a — it starts out with 1100 people, and it's a series of tournaments and you have the first round and then you have the second round. It's a winnowing down. You start with 1100 and you winnow it down and you go to the second round. Then you go from the second round into the finals. I believe that's the series.

[436] And in many of the locations where we played the first and second rounds, the quality of the golf courses wasn't as good, the availability of caddies, not always available, hard to come by. Also from the fact, and this has been a personal concern of mine over the years, is the cost of going to qualifying school is pretty expensive, and for many fellows, they couldn't afford a caddie. It was too expensive to bring their caddie, bring them into the town and be able to pay for it.

So I believe the way they had it was you could always use a cart in those, or you could bring a caddie. You could take your choice. And that's what was done in round one, round two, and then we had this discussion about the final round. And it was, well, this is going to be the final round. Let's make it like life is out on tour. Let's make it as exactingly as life is, so the quality of the course, make sure it's meticulous, make sure we are playing at the lengths, make sure the pin positions are tough, make sure that the greens are fast and let's walk. There's a number of issues.

* * *

[490] R. Ferris — X

* * *

Q. All right. Now, I want to talk to you about the Senior Tour that you've had some experience with.

Am I right that the Senior Tour has been called by many in the sports world the most successful sports venture of the 1980s?

A. I think that's a correct term, yes.

Q. And the Senior Tour includes 78 of the most talented golfers in the world, doesn't it?

A. No. The Senior Tour includes 78 of some of the used-to-be most talented golfers in the world. They are still talented, but they are not nearly as talented as the young people that play on the regular tour or the Nike Tour.

Q. Are you saying that applies to all 78 of them?

A. I'd say it applies to the vast majority of them, yes. That's why we make the courses shorter. That's why the pin positions are in the middle of the green. That's why the rough isn't as deep. There — You know, with age, we all know that the baseball player, everybody, with age your physical prowess declines, your abilities decline. So to make the statement that you just made, which is that they are, what did you say, the finest? Could you repeat what you said?

[491] Q. The field that you field for the Senior Tour —

A. Yeah.

Q. — includes 78 of the most talented golfers in the world?

A. Well, see, I have a hard time with that. It includes people who were at one time in their career the most talented golfers in the world, and if you said that they are the most talented for their age bracket, then I'd agree with that statement.

Q. All right. Well, let's say that we included the Nike Tour and the regular tour and the Senior Tour. Would those three tours together encompass the most talented golfers in the world?

A. For their differing age brackets, yes, I'd say that's a fair statement.

Q. Now, in fact, you've publicly advertised the Senior Tour players using the slogan, These Guys Are Good.

A. They are.

Q. And when the Senior Tour started in 1980, by 1986 when you were on the Senior Player Division Board, it had grown in stature beyond all expectations; is that correct?

A. That is correct.

Q. And it had done so with players using golf carts, hadn't it?

A. That is correct, because it was a nostalgia tour.

[492] Q. It had been able to establish its stature with players using golf carts, hadn't it?

A. It was a different form of competition, yes. It was a different form of competition, where you were playing for the pleasure of playing with one of your heroes, just like people go out and play with the Cubbies in Chicago. The old Cubbies, that is.

Q. Now, the Tour had evolved by 1986 into an event that had started as two events in 1980 and by 1985 was up to 27 events; is that right?

A. To the best of my knowledge, that's correct.

Q. And during that period from 1980 to 1985 there had been no discussion in any board minutes, policy board or senior division board, about cart use, had there?

A. To the best of my knowledge, that is correct.

Q. So then it was in 1985 that ESPN first televised seven Senior Tour events, wasn't it?

A. I don't know.

Q. Well, could you look at —

A. I mean, I will accept your statement as a fact.

Q. All right.

A. I'm not —

Q. And then it was in January of 1986 that Mr. Arnold Palmer raised the issue and argued that carts should be banned, wasn't it?

[493] A. The reason it was is because that's when the tour policy board — or Senior Tour board was formed. It wasn't formed until late 1985, and so now we have an official body

whereby the players can express their feelings to a board of directors rather than up through the other form of chain of command. So things were starting to become a little more formal. Things were getting a little more organized because of this sudden wealth.

Q. Actually, in 1980 was the first time a Senior Advisory Council was organized, and at that time —

A. I think that's a Players Advisory Council.

Q. Well —

A. It had no advisory council until 1986.

Q. In 1980 there was a Senior Advisory Council, am I correct?

A. That could have been a nomenclature. I can only tell you there was no board of directors for the Senior Tour until late 1985, early 1986, at which time it was formed. I believe what's referred to there probably is the — what we now call the Players Advisory Council, which we have on all tours. And that's just composed of players, to the best of my knowledge.

Q. And then it was in — after 1985 when you got the televising of your tournaments, it was in January of 1986 that Mr. Arnold Palmer first raised the issue at a board [494] meeting and argued that carts detracted from the public image of the tour; is that correct?

A. Are you reading from something so I can just accept it without having to look at it?

Q. I was reading from Mr. Palmer's testimony.

A. Oh.

Q. Given in this case.

A. I can only tell you, having been intimately involved with Mr. Palmer, being both a business associate and a close friend, that I had no pleasure in voting against him in this matter, and he has never let me forget it. But Arnold brought the subject up in 1986 because we had a forum in which to bring it up.

Q. But what he brought up was that he thought that carts detracted from the public image of the tour, wasn't it?

A. He felt it was a physical part of the game. Arnold feels very strongly that walking is an integral physical part of the game. I should know that because he's told it to me enough times.

Q. Well, could you look at Defendant's Exhibit 115.

A. 115. Okay.

THE COURT: 115 or 116?

MS. WALTERS: I thought it was 115, Your Honor.

THE COURT: Defendant's?

MS. WALTERS: Yes.

[495] THE WITNESS: Defendant's? Defendant. Is that us? That's us. Okay. Which way does it go?

MR. WISWALL: That's you.

THE WITNESS: Okay. 116, ma'am?

BY MS. WALTERS:

Q. Just a minute. I will check.

A. Okay.

Q. No. If you could look at 115, please.

A. 115.

Q. Now, these are the minutes where Mr. Palmer first raised the issue?

A. I believe that's correct.

Q. All right. And it doesn't say anything in those minutes about Mr. Palmer wanting this to be conducted as a physical competition, does it?

A. I wish I was a speed reader.

These minutes do not reflect that, but I can tell you in the discussions I've had with Mr. Palmer over the years, that's exactly what he means. Minutes don't always completely and accurately reflect everything that took place in a meeting.

Q. Well, in the discussions you've had with Mr. Palmer over the years, has he told you his feelings that he was concerned about the public image, including television?

A. I don't recall him ever saying anything about [496] television. I recall him talking about, you know, walking is integral to the game. It's part of the game. It's a physical part. You know, walking is tiring, and the older you get, the more tiring it becomes.

Q. And have you been there when Mr. Palmer has discussed with members of the tour policy board about how the image of the PGA is affected by the appearance of these carts?

A. My memory of the conversation does not revolve around image. My memory of the conversation regards — regards the part that it's an integral, purposeful part of the game.

THE COURT: We'll never finish this case if we don't move on, unless one or the other of you agree. That is not going to happen, so I think we've exhausted this. You might move on to another area.

MS. WALTERS: Thank you.

BY MS. WALTERS:

Q. At the time you made — Mr. Palmer came forward with this proposal, you suggested that what should happen is that carts should be banned and medical exemptions given; is that correct?

A. Yes, that is correct.

Q. And you were going to allow any player with a bona fide medical certificate to use a cart; is that correct?

A. As far as I was concerned, it was even broader than [497] that. In other words, we could not afford to lose, let's say, Sam Snead or Julie Boros out there. We needed every great name we could go get, so if they said they needed a cart to complete 18 holes, they got a cart.

Q. Could you look at your minutes, again, of Exhibit 138?

A. 138.

Q. That's Defendant's Exhibit 115. I'm sorry.

A. Thank you. Yes, ma'am.

Q. On the last page?

A. Yes, ma'am.

Q. And was it a unanimous determination of the board that carts be banned except that cart use would be permitted in

Pro-Am rounds and for players with bona fide medical certificates?

A. Yes, that was, you know, a medical — yeah, that's correct.

Q. That was what the division board unanimously agreed on?

A. Right. Because we needed those fellows out there for the draw.

Q. Now, to this day, then, members of the — if someone is 50 years or older and they have a medical disability, that condition is accommodated; is that right?

A. Could you repeat that, please?

[498] Q. To this day, any player who is 50 or older and who needs a cart due to a medical disability is accommodated, am I correct?

A. No. Today on the Senior Tour, to the best of my knowledge, if they want to use a cart, they can use a cart. If they want to walk, they can walk.

* * *

[576] Casey Martin — D

A. You had two options. You either had a caddie or you took a cart. And you couldn't deviate from those two.

Q. Did it change the nature of the competition?

A. Absolutely not. It was the same game. Everyone played. And the PGA Tour made no distinction, they didn't know who rode, who didn't. It was a nonissue.

Q. All right. And then — and then at the second stage of competition, same rules, USGA?

A. USGA rules. You — you know, it was the same deal as first stage.

Q. And did it change the nature of the competition as far as you could perceive?

A. Absolutely not.

Q. Okay. And did it appear that the players with carts were given any advantage over the ones that were walking and using caddies?

A. Clearly not.

* * *

[583] * * *

BY MR. WISWALL:

Q. 1.1 states the game of golf consists of playing a ball from the teeing ground into the hole by a stroke or successive strokes in accordance with the rules.

Is that your understanding of what the game is?

A. Yes.

* * *

[722] J. Bell — D

* * *

Q. All right.

Tell the court, if you would, Ms. Bell, who it is that plays under these Rules of Golf that are promulgated by the United States Golf Association?

A. Well, these are the rules of the game, so all golfers. These are for all people who play the game.

Q. So the two amateurs that go out on the weekend to play golf together would — would play by the Rules of Golf?

A. We certainly hope so.

Q. Or a tournament that is conducted at a private country club for its members, is it your understanding that that would typically be conducted under the Rules of Golf?

A. Well, that's — that's right. If you want to play golf, you need to play by these rules.

Q. Now, you mentioned the Rules of Golf as including certain provisions that are in the appendices. Would you explain to the court what you mean by that.

A. Well, it's just the way the rules are organized. When you get to the appendices, for instance, if we look at Appendix I, the language for local rules that may be adopted by the committee in charge of the competition, this is the people that are conducting the competition.

Q. Now, let's explain that a little bit more. When you say the committee in charge of conducting the competition, [723] who precisely is it that you are talking about?

A. Well, it could be, for instance, at the — at the competition you mentioned it could be the local pro, it could be a championship committee at a club. It could be — In the instance of the United States Open Championship, it would be the United States Golf Association's championship committee. And they would define the conditions of the competition. And those conditions — There's conditions in the appendix as — in terms of there's optional conditions, and there is also language for local rules that relate to specific situations on certain courses. And it's up to this committee, under Rule 33, to define the conditions of the competition.

Q. Now, let's explore that, Ms. Bell. When a committee that is conducting a competition — and let's take the PGA Tour, for example. If the committee or the organization conducting PGA Tour events decides to adopt certain of the — the optional conditions contained in the appendix to the USGA Rules of Golf, are those still rules of golf for those competitions?

A. Once they are adopted, they certainly are. They are rules of the game being played in that competition.

* * *

[730] * * *

Q. Am I correct, Ms. Bell, that the one-ball rule and the walking requirement are optional conditions that are taken from the appendix of the USGA Rules of Golf?

A. Yes, they are listed as optional conditions under Appendix I.

Q. And the USGA in its championship events adopts its optional conditions for its events?

A. We do.

Q. Now, is it correct, Ms. Bell, that walking is required in all 13 of the USGA's championship events, or are there some in which walking is not required?

A. The two championships where walking is permissible, to use automotive transportation, is in the Senior Women's Amateur Championship and the Senior Amateur Championship.

THE COURT: And the Senior what?

THE WITNESS: The United States Senior Women's Amateur Championship and the Senior Amateur

Championship. The one that's, again, it's open to anyone, Senior Amateur Championship. The Senior Women's is only for women over the age of 50. The Senior Amateur Championship is for players over the age of 55.

* * *

[794] T. Finchem — D

* * *

Q. In the qualifying tournament in past years, sir —

A. Yes.

Q. — have competitors been permitted to use golf carts?

A. They have.

Q. And what is the reason, Mr. Finchem, that competitors in the national qualifying tournament have been permitted to use golf carts in past years?

A. Well, I think there's a couple reasons. One is that the — we get an awful lot, in the thousands, of people who aspire to play the PGA Tour, who enter the qualifying tournament at the local level. Administratively it has been determined over the years that it's impossible to require them, all of those players, to — to get caddies, for the combined reasons of the availability of that number of caddies at the first and second stage of qualifying, and, I suppose, the cost of caddies, as well, plays some [795] role in that, as well.

In addition to that, the — in the early stages of qualifying, the competition is to go to a higher stage. And frankly, we get a lot of people who enter the qualifying tournament who have a quality of game that is not going to take them on to the next stage, and we view it as a winnowing-out process, if you will, but those are the basic reasons.

Q. Now, in this past year, 1997, Mr. Finchem, did the PGA Tour make a decision to alter the requirement or at least change the procedure with respect to use of golf carts, at least in the finals of the qualifying tournament?

A. Yes, we did.

* * *

[832] T. Finchem — X

* * *

Q. All right. Now, since 1988, when you did come with the Tour as an employee, am I correct that the only board meeting minutes in which carts or walking have been discussed at all were the minutes that have been offered into evidence of the March 1997 meeting, when the changes were made in the Q school format?

A. As far as I know.

Q. And you have not been able to find a single document where the defendant has put in writing, prior to 1998, that walking is a fundamental part of its tournaments, have you?

A. A document that uses those words?

Q. Well, anything that the defendant has produced which either states or in some way — whether it states directly or indirectly, that walking is a fundamental part of the tournaments it produces?

A. I don't know a document that says that, no.

Q. Now, you know that the game of golf, the essentials, the definition of the game of golf, is stated in the rules at Rule 1-1, don't you?

[833] A. Yes.

Q. And that definition of the game of golf, in its essentials, has been adopted by the PGA Tour, Inc. for its tournaments, hasn't it?

A. We accept the USGA Rules of Golf, and we reserve the right to amend them as we might see fit, which we have done from time to time.

Q. Right. But you haven't amended this definition of the game, have you?

A. No, we have not.

* * *

Appendix A

[839] * * *

Q. And you require that to the extent possible the conditions in the open qualifying shall be comparable to those of the tournament site in conditioning, speed of greens, et cetera, don't you?

A. If possible, that's correct.

Q. And that is so that you can test golfing skill, isn't it?

A. As best as we can, yes.

Q. But you don't require in that document that the golfers in the open and sectional qualifying tournaments walk, do you?

A. No, we don't.

Q. You could include that requirement if walking were an important part of your competition, couldn't you?

A. Well, we could. But it's covered under the rules of competition.

Q. Well, professional golfers do not have to walk in Monday and sectional qualifying tournaments, do they?

A. We allow them to ride carts in Monday qualifying, yes.

* * *

Appendix A

[840] * * *

Q. So you're saying that every Notice to Competitors for [841] a qualifying event would say that you don't have to walk?

A. No, I didn't say that. I said if the tournament committee determined that there was going to be — there was no requirement to walk in an open qualifying, just like the second stage — first or second stage of the qualifying school, it would most likely be in the Notice to Competitors, if you're searching for where it will appear. I will tell you that we do not require walking most weeks in opening qualifying, just like we don't require the first and second stage of the qualifying tournament. If that's what you're searching for, that's true.

* * *

[845] * * *

Q. All right. And you take in about 1200 applications, and then you winnow those down and the top 168, as long as they finish the Q school, will be members of either the regular or the Nike Tours, is that right?

A. What was the number you used?

Q. Down to 168.

A. Yes, they would be members on some level of access, that's correct.

Q. All right. The highest 37 plus ties become members of the regular Tour, and then all the remainder become members of the Nike Tour, just with differing rights, depending upon where they fall?

A. Differing levels of access, that's correct.

Q. All right.

So once the player makes it to the final stage, where you're down to those 168, he knows that he's on one tour or the other?

A. That's correct.

* * *

[870] * * *

Q. And on the medical extension that you talked about, you could make these people who have to be — who miss playing in some tournaments due to their medical condition, you could make — you could make them come back to Q school [871] and demonstrate that they can play at that level, couldn't you?

A. Well, we could. Some of them still have to. But we also provide them, if they're an exempt player, we provide them the ability to pick up some of the access they lost by virtue of the injury.

Q. And before you put that into effect they did have to come back to Q school and prove themselves?

A. Well, they had to do whatever they had to do. There was no — there was no additional access provided them because of an injury.

Q. Right. But normally they would have had to be in one of the other either top 125 money-makers, let's use the regular PGA Tour, they would have to be in the top 125, and if they couldn't be because of their injury, their only way back in was to go to Q school?

A. That's correct.

Q. And if they didn't have to go to Q school, that would give them an advantage over other players who did have to go to Q school, wouldn't it?

A. Well, I guess so. . . .

* * *

[873] * * *

A. I think walking to certain players in certain circumstances can be an advantage over riding the cart, yes.

Q. Shot-making is obviously the primary skill of professional golfers.

Appendix A

A. I think from a skill standpoint, you'd have to admit that what — the key element of skill in the game of golf is shot-making, yes.

Q. Golf carts have become a part of the game of golf in the last 30 to 40 years.

A. Absolutely.

* * * *

APPENDIX B — EXCERPTS FROM ALL-EXEMPT TOUR PRIORITY RANKINGS

ALL-EXEMPT TOUR PRIORITY RANKINGS

Each PGA TOUR player has earned a position on the priority ranking system that will be used to select tournament fields. The complete ranking system, in order of priority, is as follows:

1. Winners of PGA Championship or U.S. Open prior to 1970 or in the last 10 calendar years. (Beginning in 1998, this is a five-year exemption.)

Paul Azinger	Tom Kite
Mark Brooks	Gene Littler
Jack Burke	Davis Love III
Billy Casper	Orville Moody
John Daly	Bobby Nichols
Steve Elkington	Jack Nicklaus
Ernie Els	Arnold Palmer
Dow Finsterwald	Corey Pavin
Jack Flec	Gary Player
Raymond Floyd	Nick Price
Al Geiberger	Bob Rosburg
Wayne Grady	Jeff Siuman
Lionel Herbert	Sam Snead
Hale Irwin	Payne Stewart
Don January	Curtis Strange
Lee Janzen	Lee Trevino
Steve Jones	Ken Venturi

Appendix B

2. Winners of the THE PLAYERS Championship in the last 10 calendar years.
(Beginning in 1998, this is a five-year exemption.)

Fred Couples
Jodie Mudd
Mark McCumber
Greg Norman

3. Winners of the NEC World Series of Golf in the last 10 calendar years.
(Beginning in 1998, this is a three-year exemption.)

Fulton Allem
David Frost
Phil Mickelson
Tom Purtzer
Mike Reid
Craig Stadler

4. Winners of the Masters Tournament in the last 10 calendar years.
(Beginning in 1998, this is a five-year exemption.)

Ben Crenshaw
Nick Faldo
Sandy Lyle
Tiger Woods

5. Winners of the British Open in the last 10 calendar years (1990-present).
(Beginning in 1998, this is a five-year exemption.)

Tom Lehman
Justin Leonard

6. THE TOUR Championship winners of the last three years, beginning with the 1998 winner.

Appendix B

7. The leader in PGA TOUR official earnings in each of the last five calendar years.

8. Winners of PGA TOUR cosponsored or approved events (except team events) within the last two calendar years, or during the current year; winners receive an additional year of exemption for each additional win, up to five years.

Stuart Appleby
Phil Blackmar
Guy Boros
Michael Bradley
Billy Ray Brown
Mark Calcavecchia
Stewart Cink
John Cook
David Duval
Brad Faxon
Ed Fiori
Fred Funk
Jim Furyk
Jim Gallagher, Jr.
Bill Glasson
Paul Goydos
Dudley Hart
Tim Herron
Gabriel Hjerstedt
Scott Hoch
Peter Jacobsen
Billy Mayfair
Scott McCarron
Frank Nobilo
Mark O'Meara
David Ogrin
Loren Roberts
Clarence Rose
Vijay Singh
Paul Stankowski
Steve Stricker
David Toms
Tom Walston
D.A. Weibring
Willie Wood

9. Members of the last-named U.S. Ryder Cup team.

Jeff Maggert

Appendix B

10. Leaders in official PGA TOUR career earnings, as follows:

    a. Players among the Top 50 in career earnings as of the end of the preceding calendar year may elect to use a one-time, one-year exemption for the next year.

    John Huston
    Scott Simpson
    Fuzzy Zoeller

    b. Players among the Top 25 in career earnings as of the end of the preceding calendar-year may elect to use this special exemption for a second year, provided that the player remains among the Top 25 on the career money list.

    Chip Beck
    Bruce Lietzke

11. Sponsor exemptions (a maximum of eight, which may include amateurs with handicaps of two or less), on the following basis:

    a. Not less than two sponsor invitees shall be PGA TOUR Regular, Life or Past Champion members not otherwise exempt.

    b. Not less than two of the top 50 finishers from the last Qualifying Tournament, if not all of them can otherwise be accommodated (Note: PGA TOUR

Appendix B

members may receive unlimited number of sponsor invitations. Non-TOUR members may receive maximum of five per year.)

12. Two foreign players designated by the Commissioner.

13. The current PGA Club Professional Champion for a maximum of three open events, in addition to any sponsor selections.

    Bruce Zabriski

14. PGA Section Champion of the Section in which the tournament is played.

15. Two members of the PGA Section in which the tournament is played, who qualify through sectional qualifying competitions.

16. Four low scorers at Open Qualifying, which shall normally be held on Monday of tournament week.

17. Past champions of the particular event being contested that week, if co-sponsored by the PGA TOUR and the same tournament sponsor (except for Team events), as follows:

    Winners prior to July 28, 1970 — unlimited exemptions for such events.

    Winners after July 28, 1970 — ten years of exemptions for such events.

* * * *

APPENDIX C — EXCERPTS FROM 1997 PGA TOUR QUALIFYING TOURNAMENT

1997 PGA TOUR QUALIFYING TOURNAMENT

Grenelefe Golf and Tennis Resort, Grenelefe, FL
West Course — Par: 36-36 — 72 Yards: 7,301
South Course — Par: 36-35 — 71 Yards: 6,717

December 3-8, 1997

Approximately 1.200 applications were received, with 11 first-stage regionals and six second-stage regionals held to reduce the field to 168 players for the final qualifying stage, which was six rounds with no cut.

There were two weather delays during the tournament. The second-round start time on Thursday was delayed from 8:30 a.m. until noon due to rain, and the 8:30 a.m. start time for Sunday's fifth round was delayed 30 minutes due to frost.

The top-35 players and ties (a total of 38) received their PGA TOUR cards for 1998. The next 77 finishers earned fully exempt NIKE TOUR cards for 1998, and the balance of the field earned conditional NIKE TOUR status for 1998.

The following players earned their 1998 PGA TOUR cards:

1.	Scott Verplank	66-64-67-70-69-71	407
2.	Blaine McCallister	67-70-68-72-66-70	413
3.	Lee Porter	70-71-67-69-71-68	416
4.	Stephen Ames	70-68-69-69-70-70	416
5.	Spike McRoy	69-71-69-71-68-69	417

6.	Franklin Langham	72-71-68-68-66-72	417
7.	Sonny Skinner	71-70-66-73-69-69	418
8.	Jim McGovern	75-66-68-69-72-68	418
9.	Bob Gilder	67-72-69-74-68-69	419
10.	John Riegger	70-69-70-72-68-70	419
11.	Bruce Fleisher	69-72-69-69-71-69	419
12.	Richard Coughlan	73-66-70-70-71-69	419
13.	Vance Veazey	73-68-66-71-71-70	419
14.	Guy Hill	69-67-69-73-69-72	419
15.	Hugh Royer III	67-71-69-70-71-71	419
16.	Kent Jones	72-70-67-64-71-75	419
17.	Niclas Fasth	73-67-74-72-63-71	420
18.	Kevin Wentworth	72-69-68-73-68-70	420
19.	J.P. Hayes	71-69-67-74-66-73	420
20.	Tim Conley	70-73-73-71-69-65	421
21.	Jim Estes	71-72-71-71-70-66	421
22.	Esteban Toledo	71-72-70-70-66-72	421
23.	Steve Jurgensen	74-67-67-73-69-71	421
24.	Keith Nolan	71-70-68-70-70-72	421
25.	Tom Pernice, Jr.	71-69-67-70-70-74	421
26.	Clark Dennis	71-72-69-74-66-70	422
27.	John Morse	74-70-70-72-66-70	422
28.	Craig Barlow	76-67-70-71-71-67	422
29.	Bradley Hughes	70-73-67-74-68-70	422
30.	Dicky Pride	72-68-69-72-69-72	422
31.	Mike Weir	71-68-69-72-71-71	422
32.	Jeff Gallagher	71-67-69-73-69-73	422
33.	Bob Friend	76-69-76-69-70-63	423
34.	Iain Steel	68-75-72-72-67-69	423
35.	Mark Wurtz	75-69-66-76-67-70	423
36.	Bobby Gage	69-77-66-69-70-72	423
37.	Lan Gooch	69-68-70-71-73-72	423
38.	Tim Loustalot	71-71-69-68-69-75	423

APPENDIX D — CONSOLIDATED STATEMENTS OF ACTIVITY OF THE PGA TOUR, INC. AND SUBSIDIARIES

CONSOLIDATED STATEMENTS OF ACTIVITY
PGA TOUR, INC. and SUBSIDIARIES

(in thousands)

	1995 Actual	1996 Actual	1997 Projected
REVENUES			
Television Revenues	$ 86,967	$ 95,575	$103,259
Tournament Revenues	90,938	101,395	104,851
Tournament Players Clubs	69,275	76,423	90,810
Marketing and Promotions Revenues	24,202	29,053	32,380
Interest and other income	13,027	15,112	12,742
TOTAL REVENUES	**284,409**	**317,558**	**344,042**
EXPENSES			
Television Costs and Expenses	32,367	32,532	33,873
Tournament Operations Expenses	27,496	33,210	37,526
Tournament Players Clubs	58,097	64,620	78,678
Marketing and Promotions Expense	8,996	9,367	9,231
Interest Expense	4,004	2,930	3,205
TOTAL EXPENSES	**130,960**	**142,659**	**162,513**
REVENUES OVER EXPENSES FROM OPERATIONS	**153,449**	**174,899**	**181,529**

Board Designated Funds Utilized (Reserved) for Allocations (Net)	4,286	(922)	(2,545)
NET REVENUES AVAILABLE FOR ALLOCATIONS	**157,735**	**173,977**	**178,984**
ALLOCATIONS TO PLAYERS AND SPONSORS			
Players Prize Money/ Sponsor Allocations	131,519	142,148	152,084
Player Retirement Plan contributions:			
PGA TOUR	5,000	5,500	6,000
Senior PGA TOUR	3,750	4,000	4,500
Retirement Plan Earnings	6,060	6,045	5,875
TOTAL ALLOCATIONS	**146,329**	**157,693**	**168,459**
REVENUES OVER ALLOCATIONS AND EXPENSES FROM OPERATIONS	11,406	16,284	10,525
State and Federal Income Taxes	(4,027)	(3,307)	(3,348)
REVENUES OVER EXPENSES AND ALLOCATIONS ADDED TO UNDESIGNATED UNDISTRIBUTED NET ASSETS	**$ 7,379**	**$ 12,977**	**$ 7,177**

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	Year Ended December 31	
	1996	1995
	in thousands	
Revenues:		
Television revenues	**$ 95,575**	$ 86,967
Tournament revenues	**100,590**	89,833
Tournament Players Clubs	**76,423**	69,275
Marketing and promotions revenues	**28,447**	21,506
Interest and other income	**16,536**	13,312
Total Revenues	**317,571**	280,393
Expenses:		
Television costs and expenses	**34,012**	34,124
Tournament operations	**34,724**	29,248
Tournament Players Clubs	**64,620**	58,097
Marketing and promotions expenses	**7,141**	6,664
Interest and financing expense	**2,162**	2,827
Total Expenses	**142,659**	130,960
Revenues over expenses from operations	**174,912**	149,433
Provision for income taxes	**3,307**	4,027
Net Revenues over Expenses	**171,605**	145,406

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Board designations for future Player and Sponsor purposes.		
Additions to designated undistributed net assets	**(7,906)**	(2,049)
Allocations for designated purposes	**6,971**	10,351
	170,670	153,708
Allocations to Players and Sponsors:		
Players prize money and Sponsor allocations	**142,148**	131,519
Player Retirement Plans contributions	**9,500**	8,750
Player Retirement Plans earnings	**6,045**	6,060
Total Allocations to Players and Sponsors	**157,693**	146,329
Change in undesignated net assets from operations	**$ 12,977**	$ 7,379

APPENDIX E — EXCERPTS FROM APPLICATION TO ENTER 1997 PGA TOUR QUALIFYING TOURNAMENT (FOR PGA AND NIKE TOUR)

APPLICATION TO ENTER
1997 PGA TOUR QUALIFYING TOURNAMENT
(FOR PGA AND NIKE TOUR)
CONDUCTED BY THE PGA TOUR

First Qualifying Stage (72 Holes Scheduled)
Second Qualifying Stage (72 Holes Scheduled)
Final Qualifying Stage (108 Holes Scheduled)

The undersigned hereby applies to enter the 1997 PGA TOUR Qualifying Tournament. Although membership in the PGA TOUR and NIKE TOUR is based principally on this competition, PGA TOUR reserves the right to apply other reasonable criteria (including but not limited to, character, conduct, financial responsibility, etc.) to all applicants for membership. Based on all such factors, the PGA TOUR in its discretion will determine whether to extend the undersigned an invitation to join the applicable Tour.

If the undersigned successfully qualifies and accepts such invitation to join the PGA TOUR or NIKE TOUR, he shall pay the fees and dues and abide by the *Tournament Regulations* of the PGA TOUR or NIKE TOUR, as applicable, in consideration of all the rights and privileges of such membership.

The undersigned also understands that this application may at any time be rejected (including during the Qualifying Tournament) by the PGA TOUR. Conduct unbecoming a professional or noncompetitive performance in previous

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PGA TOUR Qualifying Tournaments or NIKE TOUR Qualifying Tournaments can be a basis for the rejection of an application.

The PGA TOUR reserves the right to change the Qualifying Tournament format and schedule of play as presently contemplated.

I. FORMAT AND SCHEDULE OF PLAY

Competition will be in three stages, at stroke play:

A. First Qualifying Stage — 72 holes scheduled — for all applicants except the following, who are automatically exempt into the Second Qualifying Stage:

1. 1997 PGA TOUR members.

2. Former winners of Tournament Players Series, Ben Hogan Tour or NIKE TOUR tournaments.

3. Those who have earned $100,000 or more in official PGA TOUR prize money (as determined in accordance with *PGA TOUR Tournament Regulations*) in their careers as of September 26, 1997.

4. Those who have made 25 or more cuts in tournaments awarding official PGA TOUR prize money (as determined in accordance with *PGA TOUR Tournament Regulations*) in their careers as of September 26, 1997.

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5. Those finishing 26-55 on the final 1997 Official NIKE TOUR Money List (as defined in the *NIKE TOUR Tournament Regulations*).

6. Winners of PGA Section Championships from September 20, 1996 through September 26, 1997.

7. PGA Assistant Professionals originally qualified to play in the 1997 Foot Joy Titleist PGA Assistants Championship.

8. The low 50 scores and ties from the 1997 PGA Club Professional Championship.

9. Professionals making the 36-hole cut in the 1997 PGA Championship.

10. The leading fourth, fifth and sixth available players, to a limit of 25th position, on each of the three international tours (PGA European Tour, Japan PGA and Australasian Tour) applicable official money list or order of merit as of September 26, 1997.

Field sizes will be approximately 78 players, with no reduction of fields scheduled. The number of players advancing from each First Qualifying Stage site will be on a pro rata basis (i.e., an approximately equal percentage of players from each site will advance), and will be announced during the First Qualifying Stage. PGA TOUR reserves the right to add players to the field of the Second Qualifying Stage if it deems it appropriate.

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Dates	**Site**	**Course or Club**
Tues – Fri	Dayton, NV	Dayton Valley CC
Oct. 14-17	Jackson, MS	Colonial CC (Deerfield Course)
	Murfreesboro, TN	Old Fort GC
	Pensacola, FL	Pensacola CC
	Wilmington, NC	Porters Neck Plantation
	Savannah, GA	Southbridge GC
Tues – Fri	Llano, CA	Crystalaire CC
Oct. 21-24	Valrico, FL	Bloomingdale GC
	Bogart, GA	Jennings Mill GC
	West Palm Beach, FL	Bear Lakes CC (Lakes Course)
	Richmond, TX	Longwood GC

B. Second Qualifying Stage — 72 holes scheduled — After the First Qualifying Stage, the field for the Second Qualifying Stage will be approximately 468 players, including all those automatically exempt for the Second Qualifying Stage and any other players which PGA TOUR deems should be added to the Second Qualifying Stage. After entries of the exempt players are processed, Second Qualifying Stage preferences will be based upon First Qualifying Stage finish positions and in the order described to determine alternates under Section IV.B.3. All applicants will participate in this qualifying stage except the following who are automatically exempt into the Final Qualifying Stage.

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1. Those applicants among the top 25 finishers immediately after the 125th position on the final 1997 Official PGA TOUR Money List (as defined in the PGA TOUR *Tournament Regulations*).

2. Those applicants finishing 16-25 on the final 1997 Official NIKE TOUR Money List (as defined in the NIKE TOUR *Tournament Regulations*).

3. The leading first, second and third available players, to a limit of 10th position, on each of the three international tours (PGA European Tour, Japan PGA and Australasian Tour) applicable official money list or order of merit as of September 26, 1997.

Field sizes shall be limited to 78 players with no reduction of fields scheduled. The number of players advancing from each Second Qualifying Stage site into the First Qualifying Stage will be on a pro rata basis, and announced during the Second Qualifying Stage. PGA TOUR reserves the right to add players to the field of the First Qualifying Stage if it deems it appropriate.

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Dates	**Site**	**Course or Club**
Tues-Fri	Florence, SC	The CC of South Carolina
Nov. 11-14	Kingwood, TX	Deerwood GC
	Panama City, FL	Hombre CC
Tues-Fri	Rio Rico, AZ	Rio Rico Resort
Nov. 18-21	Seaside, CA	Bayonet Black Horse (Bayonet Course)
	Gull Shores, AL	Kiva Dunes

C. Final Qualifying Stage — 108 holes scheduled — After the Second Stage, the field for the Final Qualifying Stage will be approximately 168 players, including applicants automatically exempt under Section 1.B.3. Play will be on the Grenelefe Golf & Tennis Resort West and South Courses (Haines City, Florida). Dates will be Wednesday through Monday, December 3-8, 1997. The field will play 108 holes with no cut. PGA TOUR reserves the right to add players to the field if it deems it appropriate. Groupings for the first and second rounds will alternate courses; groupings for the third and fourth rounds will be done based on scores, alternating courses; groupings for the fifth and sixth rounds will be done based on scores, alternating courses.

II. PGA TOUR MEMBERSHIP

PGA TOUR memberships for 1998 will be awarded to the lowest 35 finishers and any tying for 35th position after the conclusion of play in the Final Qualifying Stage.

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Ties among those earning PGA TOUR membership will be broken for the purpose of ranking (i.e., determining a Qualifying Tournament player's initial number on the 1996 eligibility list) by matching combined sixth and fifth round scores. Ties remaining after a match of combined sixth and fifth round score will be broken by matching 18-hole scores from the contestants' last completed round on the Grenelefe West Course. Ties remaining after a match of rounds will be broken by matching hole scores, beginning with the last completed hole at Grenelefe West Course. (PGA TOUR reserves the right to periodically reevaluate Qualifying Tournament members in 1998, and to reorder the ranking based on competitive performance during the 1998 season). If fifth and sixth rounds cannot be completed, the numbering would be consistent with Section VII Postponements and Cancellations.

Access to PGA TOUR cosponsored tournaments is determined by a player's finish position at the PGA TOUR Qualifying Tournament and is subject to change as a result of the periodic reshuffle, which benefits those players who perform best.

In 1996, 39 cosponsored tournaments awarded official prize money. Listed below are the number of such tournaments certain positions from the initial numbering and during the periodic renumberings were able to play in 1996.

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CATEGORY POSITION	NUMBER OF 1996 TOURNAMENTS
QT #1	33 of 39
QT #15	30 of 39
QT #30	27 of 39
QT Last Position	21 of 39

A minimum of $500,000 in prize money will be distributed among those earning PGA TOUR and fully exempt NIKE TOUR memberships.

III. NIKE TOUR MEMBERSHIP

Following the lowest 35 finishers and ties who earn PGA TOUR memberships, the next number of finishers nearest 70 will earn fully exempt 1998 NIKE TOUR memberships and all remaining players in the Final Qualifying Stage and alternates for the Final Qualifying Stage will earn nonexempt 1998 NIKE TOUR memberships. Ties among those earning NIKE TOUR membership will be broken for the purpose of ranking (i.e., determining a player's initial number on the 1998 eligibility list) by matching combined fifth and sixth round scores. Ties remaining after a match of combined sixth and fifth round score will be broken by matching 18-hole scores from the contestants' last completed round on the Grenelefe West Course. Ties remaining after a match of rounds will be broken by matching hole scores, beginning with the last completed hole at Grenelefe West. Alternates will be ranked in the order in which they are alternates for the Finals, as described in Section IV.B.3 of this application.

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IV. WITHDRAWALS; SUBSTITUTIONS AND REALLOTMENT OF SPOTS

A. Applicants withdrawing prior to their first applicable stage of competition **MUST** inform PGA TOUR of withdrawal by telephone by the applicable deadline listed below in order to receive a refund of entry fee.

NOTE: Only withdrawals made personally by the applicant will be accepted. Any attempt to withdraw an applicant by someone other than the applicant himself will *not* be accepted. Applicant must also state his entry confirmation number when withdrawing from Qualifying Tournament.

All applicants are *REQUIRED* to substantiate verbal withdrawal in writing in order for their refund to be processed. *REFUNDS WILL NOT BE PROCESSED UNTIL WRITTEN SUBSTANTIATION OF WITHDRAWAL IS RECEIVED*. A processing fee of $100 will be automatically deducted from **ALL** withdrawal refunds. Notwithstanding any prior written notice of withdrawal furnished by applicant, once an applicant begins play in any stage of the Qualifying Tournament, he will be ineligible to receive such refund.

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WITHDRAWAL DEADLINE

First Qualifying Stage — 5:00 p.m. EDT Tuesday, October 7, 1997.

Second Qualifying Stage — 5:00 p.m. EST Tuesday, November 4, 1997.

Final Qualifying Stage — 5:00 p.m. EST Tuesday, November 25, 1997.

B. Alternates from each site will be determined by hole-by-hole playoffs held immediately following the conclusion of play at each site to determine the order for alternates. Five alternates will be determined from each First Qualifying Stage site and three alternates will be determined from each Second Qualifying Stage site. Substitutions and reallotment of positions for alternates from withdrawals will be made as follows:

1. If a successful First Qualifying Stage player withdraws prior to such player beginning play in the Second Qualifying Stage, the first available alternate from the same First Qualifying Stage site will be substituted.

2. If a successful Second Qualifying Stage player withdraws prior to such player beginning play in the Final Qualifying Stage, the first available alternate from the same Second Qualifying Stage site will be substituted.

3. If an applicant automatically exempt into the Second Qualifying Stage withdraws before all players have begun play in the First Qualifying Stage, the position will be included in the positions to be allocated to the First Qualifying Stage sites on a pro rata basis.

   If a player automatically exempt into the Second Qualifying Stage withdraws after all players have begun play in the First Qualifying Stage (a "Second Qualifying Stage Automatically Exempt Withdrawal"), the position reserved will be reallotted to the first available alternate from the various First Qualifying Stage sites determined in accordance with the following procedure.

   Before play has concluded at the first to occur of the First Qualifying Stages, Tournament Competition personnel at PGA TOUR Headquarters will conduct a blind clinical drawing to determine the order in which the alternates from the First Qualifying Stage sites will replace Second Qualifying Stage Automatically Exempt Withdrawals. In conducting such drawing, each First Qualifying Stage site will be written on an index card and all cards will be shuffled. Cards will then be drawn on a blind basis one by one for purposes of determining the 11 First Qualifying Stage sites in order. The first alternate from the first First Qualifying Stage site drawn will be the first alternate to replace a Second Qualifying Stage Automatically Exempt

Withdrawal, the first alternate from the second First Qualifying Stage site drawn with be the second alternate to replace a Second Qualifying Stage Automatically Exempt Withdrawal, and so on through the first alternate from the First Qualifying Stage site which is chosen 11th. Alternates 12 through 22 will be the second available alternates from the various First Qualifying Stage sites in the order drawn, and alternates 23 through 33 will be the third available alternates from the various First Qualifying Stage sites in the order drawn and so on.

4. If an applicant automatically exempt in the Final Qualifying Stage withdraws before all players have begun play in the Second Qualifying Stage, the position will be included in the positions to be allocated to the Second Qualifying Stage sites on a pro rata basis.

   If an applicant automatically exempt into the Final Qualifying Stage withdraws after all players have begun play in the Second Qualifying Stage (a "Final Qualifying Stage Automatically Exempt Withdrawal"), the position reserved will be reallocated to the first available alternate from the various Second Qualifying Stage sites determined in accordance with the following procedure.

   Before play has concluded at the first to occur of the Second Qualifying Stages, Tournament Competition personnel at PGA TOUR

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Headquarters will conduct a blind clinical drawing to determine the order in which the alternates from the Second Qualifying Stage sites will replace Final Qualifying Stage Automatically Exempt Withdrawals. In conducting such drawing, each Second Qualifying Stage site will be written on an index card and all cards will be shuffled. Cards will then be drawn on a blind basis one by one for purposes of setting the six Second Qualifying Stage sites in order. The first alternate from the first Second Qualifying Stage site drawn will be the first alternate to replace a Final Qualifying Stage Automatically Exempt Withdrawal, the first alternate from the second Second Qualifying Stage site drawn will be the second alternate to replace a First Qualifying Stage Automatically Exempt Withdrawal, and so on through the first alternate from the Second Qualifying Stage site which is chosen sixth. Alternates 7 through 12 will be the second available alternates from the Second Qualifying Stage sites in the order drawn, and alternates 13 through 18 will be the third available alternates from the Second Qualifying Stage sites in the order drawn.

V. ENTRY FEES; CLOSING DATE

ENTRY APPLICATIONS MUST REACH PGA TOUR HEADQUARTERS BY 5:00 P.M. EDT ON FRIDAY, SEPTEMBER 26, 1997. NO FACSIMILE APPLICATIONS WILL BE ACCEPTED.

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ALL APPLICANTS MUST ENTER BY THE ENTRY DEADLINE OF SEPTEMBER 26, 1997, WITHOUT EXCEPTION.

Subsequent to and based upon final results of the NIKE TOUR Championship, some exemptions into the Second Qualifying Stage will be earned. Such applicants will be refunded $250 and their entry will be adjusted.

A. Applicants required to play in the FIRST QUALIFYING STAGE: *$3,000*

B. Applicants required to play in the SECOND QUALIFYING STAGE: *$2,750*

C. Applicants required to play in the FINAL QUALIFYING STAGE: *$2,500*

NOTE: Entry fees for First and Second Qualifying Stages includes greens fees, practice balls and, if applicable, half of an 18-hole golf cart on each day beginning at noon two days before and during every day of competition. Entry fee for Final Qualifying Stage includes greens fees and practice balls beginning two days before and during every day of competition. Use of golf carts is prohibited at the Final Qualifying Stage; players are required to use caddies.

ONCE AN APPLICANT HAS TEED OFF IN ANY QUALIFYING STAGE, REFUND OF ENTRY FEE IS NOT POSSIBLE.

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All applicants must apply on the PGA TOUR's Application to Enter 1997 PGA TOUR Qualifying Tournament form and pay the fee prescribed herein.

ACCEPTANCE OF APPLICATION TO ENTER; NOTICE OF QUALIFYING SITE(S)

Upon receipt of entry, all applicants will be assigned a confirmation number indicating that their application has been received and that they are entered into the Qualifying Tournament. Applicant is responsible for keeping this confirmation number and must refer to it when contacting PGA TOUR regarding his entry. Written notification for assignment of qualifying site(s) with confirmation number will be sent by Wednesday, October 8, 1997. ***PGA TOUR IS NOT RESPONSIBLE*** for the timely delivery of the U.S. Postal Service OR any overnight carrier. It is the applicant's responsibility to contact PGA TOUR Headquarters to verify his status in qualifying site(s).

PLEASE NOTE First Qualifying Stage assignments are made based on the date application is received at PGA Headquarters (first come, first served). In order to improve your chances to play at the First Qualifying Stage of your choice, it is IMPERATIVE that your application be received early by PGA TOUR. While PGA TOUR will attempt to accommodate an applicant's preference, assignment to qualifying sites shall be in the discretion of PGA TOUR. Assignments to Second Qualifying Stage sites will be based on First Qualifying Stage finish positions.

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VII. INFORMATION, CONDITIONS, ETC.

PRACTICE

Applicants may practice at no charge:

First and Second Qualifying Stages — beginning at 12:00 noon two days before the first tournament round and;

Final Qualifying Stage — Monday and Tuesday, December 1 and 2, 1997

Practice before these designated times must be set up with course in advance by applicant. Fees for these practice rounds are at the discretion of the host facility.

RULES OF GOLF

Play shall be governed in accordance with the Rules of Golf of the United States Golf Association, as modified by PGA TOUR. Questions or disputes shall be settled by the Rules Committee appointed by PGA TOUR, whose decisions shall be final.

POSTPONEMENTS AND CANCELLATIONS

If, in the judgment of the on-site PGA TOUR Tournament Director (whose decision shall be final), adverse weather conditions or any other occurrence or condition beyond the control of PGA TOUR renders commencement or continuation of tournament play inadvisable, play shall

be postponed until such time as the Tournament Director, determine that such weather conditions or other occurrence have improved sufficiently for play to commence or resume, provided that:

First and Second Qualifying Stage is normally scheduled for four rounds and Final Qualifying Stage is normally scheduled for six rounds and in all cases arrangements have been made with the host club to extend through one additional day in the event of postponement or suspensions. The completion of First and Second Qualifying Stage or Final Qualifying Stage competition shall not be postponed beyond one additional day: (a) unless the tournament is not yet considered "official" (at least 36 holes completed for First or Second Qualifying Stage and 72 holes completed fro Final Qualifying Stage); or (b) if at least half the field has completed play before the postponement of the final round, the final round will be completed when conditions permit. If the sixth round cannot be completed as stated above, qualifying would revert back to the standings at the competition of the fourth round.

APPEARANCE OF PLAYERS

Players shall present a neat appearance, in both clothing and personal grooming. Blue jeans or shorts shall *not* be worn during practice or Qualifying Stage rounds.

CONDUCT OF PLAYERS

A. If a player is determined by Tournament Officials on site at any stage of the Qualifying Tournament to be noncompetitive, PGA TOUR reserves the right to remove said player from the competition.

B. In accordance with the PGA TOUR Alcohol and Substance Abuse Policy, players are *not* permitted to consume alcoholic beverages during any practice round *or* tournament round, on the practice tee *or* putting green. Violation of this policy will result in the removal of the player from the competition.

CADDIES/GOLF CARTS

A caddie and/or golf cart is required during all practice and tournament rounds of the First and Second Qualifying Stages. No more than two carts will be allowed per grouping. The player may designate an individual to serve as a caddie and drive a cart for him. Caddies are required to wear long pants while on property. Use of golf carts is prohibited during the Final Qualifying Stage. Players are required to use caddies.

NEW MEMBER ORIENTATION

New PGA TOUR members will be *required* to attend the New Member Orientation Program (beginning with a reception on Tuesday evening) December 9 through Friday, December 12, at the TPC at Sawgrass Media Center in Ponte Vedra Beach, FL. During the New

Appendix E

Member Orientation Program, the PGA TOUR will incur housing and meal expenses, and will allocate a travel allowance. Further information will be made available immediately following the Qualifying Tournament.

New NIKE TOUR members will be required to attend an orientation session on Tuesday, December 9, 1997 from 7:30 a.m. to 12:00 noon at Grenelefe Resort. Exact locations will be posted at the PGA TOUR official scoreboard.

INQUIRIES

Please direct inquiries regarding the 1997 PGA TOUR Qualifying Tournament to:

Tournament Competition
PGA TOUR, Inc.
112 TPC Boulevard
Ponte Vedra Beach, FL 32082
Phone: 904-285-3700 Fax: 904-285-2052

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APPENDIX F — EXCERPTS FROM THE RULES OF GOLF 1998-1999 AND THE RULES OF AMATEUR STATUS (THE USGA)

* * *

SECTION III
THE RULES OF PLAY

THE GAME
Rule 1. The Game

1-1. General

The Game of Golf consists in playing a ball from the teeing ground into the hole by a stroke or successive strokes in accordance with the Rules.

* * *

ADMINISTRATION
Rule 33. The Committee

33-1. Conditions; Waiving Rule

The Committee shall lay down the conditions under which a competition is to be played.

The Committee has no power to waive a Rule of Golf.

Certain special rules governing stroke play are so substantially different from those governing match play that combining the two forms of play is not practicable and is not permitted. The results of matches played and the scores returned in these circumstances shall not be accepted.

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In stroke play the Committee may limit a referee's duties.

* * *

Appendix I
LOCAL RULES;
CONDITIONS OF THE COMPETITION

* * *

Conditions of the Competition

Rule 33-1 states: "The Committee shall lay down the conditions under which a competition is to be played." Conditions should include such matters as method of entry, eligibility requirements, format, the method of deciding ties, the method of determining the draw for match play and handicap allowances for a handicap competition.

* * *

OPTIONAL CONDITIONS

* * *

Transportation

If it is desired to require players to walk in a competition, the following condition is suggested:

Players shall walk at all times during a stipulated round.

* * * *

APPENDIX G — NOTICE TO COMPETITORS
1997 QUAD CITY CLASSIC

NOTICE TO COMPETITORS
1997 QUAD CITY CLASSIC

This information supplements the PGA TOUR RULES OF PLAY.

OUT OF BOUNDS — Defined by white stakes and where applicable white stakes tying into snow fencing and green web fencing.

The Driving Range is out of bounds. Defined by white stakes and where applicable white stakes tying into chain link fencing, snow fencing and green web fencing.

FLOWER BEDS — are ground under repair. Defined by wooden ties, black plastic or the cut of the ground.

AUTOMOTIVE TRANSPORTATION — Competitors are permitted to use Automotive Transportation during play of Hole #12.

PGA TOUR RULES COMMITTEE

* Do not put a white line around the TV compound!

APPENDIX H — EXCERPTS FROM CONDITIONS OF COMPETITION AND LOCAL RULES

CONDITIONS OF COMPETITION AND LOCAL RULES

The Rules of the United States Golf Association govern play, as modified by the PGA TOUR. See applicable competition's "Notice to Competitors (Players)" for additional Definitions, Local Rules and Conditions. Complete text of Rules and Appendix I may be found in the current Rules of Golf.

Unless otherwise noted the penalty for a breach of a Local Rule or Condition is:

Match play — Loss of Hole; Stroke Play — Two Strokes

Section A — Conditions of Competition

* * *

6. Transportation — Appendix I

Players shall walk at all times during a stipulated round unless permitted to ride by the PGA TOUR Rules Committee. Penalty for Breach of Condition:

Match play — At the conclusion of the hole at which the breach is discovered, the state of the match shall be adjusted by deducting one hole for each hole at which a breach occurred. Maximum deduction per round: two holes.

Stroke play — Two strokes for each hole at which any breach occurred; maximum penalty per round; four strokes. In the event of a breach between the play of two holes, the penalty applies to the next hole.

Match or stroke play — Use of any unauthorized form of transportation shall be discontinued immediately upon discovery that a breach has occurred. Otherwise, the player shall be disqualified.

* * * *

APPENDIX I — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION IN *JONES v. UNITED STATES GOLF ASSOCIATION, INC.* DATED, ENTERED AND FILED JUNE 15, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL NO. A-00-CA-278 JN

JA RO JONES

VS.

UNITED STATES GOLF ASSOCIATION, INC.

ORDER

Before the Court is Plaintiff Jones' Application for Preliminary Injunction. On June 14, 2000, the Court conducted a hearing in open court and heard arguments on this matter. Upon consideration of the arguments presented at the hearing, the evidence submitted, the briefs filed, the United States of America's *amicus curiae* brief, the applicable legal authority and the entire case file, the Court enters the following Order.

I. Factual Background

Plaintiff Jones is a skilled golfer who suffers from Post Polio Syndrome. This disability[1] forces Plaintiff to use a cart

1. The parties stipulated that Plaintiff Jones is disabled within the meaning of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12181 *et seq.* ("ADA").

to play golf. In all other ways he qualifies to participate in the qualifying round of the United States Senior Open Golf Championship ("Senior Open"). The United States Golf Association ("USGA") does not allow the use of golf carts in the Senior Open. Plaintiff Jones filed suit pursuant to Title III of the ADA seeking an injunction requiring the USGA to allow him to use a cart to play in the United States Senior Open and its qualifying round.

II. Laches

As a preliminary matter, the USGA pleads the defense of laches to Plaintiff's application for preliminary injunction. Essentially the USGA argues that Plaintiff Jones has known for over three years, since he first applied for a waiver of the no-cart rule, that he would not be granted leave to use a cart in the Senior Open. USGA argues that filing suit at this late date, mere days before the qualifying round, has prejudiced its right to present a defense. Upon consideration of the Defendant's arguments and pursuant to the elements necessary to prove laches as set forth in *National Ass'n of Govern. Emp. v. City Pub. Serv.*, 40 F.3d 698, 708 (5th Cir. 1994), the Court finds there was no undue delay on the Plaintiff's part and that there is no undue prejudice on the Defendant's ability to present a defense. Therefore, the Court finds that Defendant's laches argument is without merit.

II. Preliminary Injunction

To obtain a preliminary injunction, the Plaintiff must demonstrate: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the relief

is not granted; (3) that granting injunctive relief will not result in even greater harm to the other party; and (4) that granting relief will be in the public interest. *United Offshore Co. v. S. Deepwater Pipeline*, 899 F.2d 405, 407-08 (5th Cir. 1990).

Plaintiff's cause of action is based upon Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181 *et seq.* Upon review of the ADA and the relevant cases, particularly *Martin v. PGA Tour, Inc.*, 204 F.3d 994 (9th Cir. 2000); *Olinger v. United States Golf Ass'n*, 205 F.3d 1001 (7th Cir. 2000); and *Johnson v. Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052 (5th Cir. 1997), the Court finds that Plaintiff has demonstrated a substantial likelihood of success on the merits. The Court further finds that Plaintiff has demonstrated a substantial threat of irreparable harm because Plaintiff Jones' condition is worsening and this is in all likelihood his last opportunity to compete in the Senior Open. *See* Affidavit of Ja Ro Jones. The Court finds that granting injunctive relief will not result in harm to the USGA. Finally, the Court finds that the public interest weighs in favor of granting injunctive relief.

No arguments were made concerning bond. A district court may elect not to require bond. *See Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996). Accordingly, the Court finds no bond is required in this case.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the USGA is hereby ENJOINED from prohibiting Plaintiff Ja Ro Jones from using a golf cart during the Senior United States Open Golf Championship and its qualifying round.

IT IS FURTHER ORDERED that no bond shall be required.

SIGNED AND ENTERED this 15th day of June, 2000.

s/ James R. Nowlin
JAMES R. NOWLIN
CHIEF UNITED STATES
DISTRICT JUDGE

Supreme Court, U.S.
FILED
AUG 16 2000
CLERK

(3)

No. 00-24

IN THE
Supreme Court of the United States

PGA TOUR, INC.,
Petitioner,

v.

CASEY MARTIN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

The Brief in Opposition filed by respondent calls attention to the need for review in this case. With respect to the overall scope of Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181-12189, respondent advances the remarkably broad proposition that Title III applies without distinction to any person in any location at a place of public accommodation, regardless of whether they are patrons or workers and regardless of whether they are in work areas or areas generally open to the public. Then, with respect to the specific issue dividing the Ninth and Seventh Circuits, *compare* Pet. App. 8a-14a *with Olinger v. United States Golf Ass'n*, 205 F.3d 1001, 1005-07 (7th Cir. 2000), respondent insists that the waiver of substantive competitive rules for some competitors does not itself fundamentally alter the nature of a high-level athletic competition, arguing that courts instead should decide on a case-by-case basis which competitive rules are important and which can be selectively modified for a disabled athlete without undue competitive advantage. These far-reaching positions find no

basis in the Act, and we urge this Court to grant review in order to clarify what the Act requires.

1. The initial question regarding application of Title III to this case is not whether Title III broadly protects against discrimination at places of public accommodation (it concededly does), but whether it provides a basis for the specific claim of discrimination made by respondent here: that the rules of competition at the highest-level Tour events prevent him from earning his living as a member of the Tour. Even though the same basic claim was brought, and rejected, under the provisions of the Act dealing directly with discrimination with regard to work-related terms and conditions, *see* Pet. 5-7 (discussing Title I allegations), respondent argues that the claim is nonetheless grounded in the "unambiguous language" of Title III. Brief in Opp. 1, 7, 10. Proceeding from the fact that the Tour events are conducted at golf courses, and that golf courses are generally regarded as places of public accommodation subject to Title III, respondent all but assumes the conclusion that he is thus an "individual" being denied "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of [a] place of public accommodation . . . ." 42 U.S.C. § 12182(a). This abbreviated analysis, however, takes no account of other important language in Title III, or the structure of the Act as a whole, both of which indicate that this particular claim falls outside the boundaries of Title III.

To begin with, although respondent evidently regards the term "individual" as all-inclusive, the most pertinent textual evidence suggests that the term, taken in context, is not intended to encompass persons (like respondent) seeking to perform work for entities (like the Tour) that own or operate places of public accommodation. Section 12182(b)(1)(A)(iv) of the Act, which deals in part with the problem of discrimination against an " 'individual or class of individuals' . . . [through] contractual, licensing, or other arrangement[s]," specifically defines the term

"[i]ndividual or class of individuals" to mean the "*clients or customers* of the covered public accommodation that enters into [a] contractual, licensing or other arrangement," *id.* (emphasis added), a description that obviously excludes persons working there. *Compare* 42 U.S.C. § 12112(b)(2) (provision in Title I protecting "qualified applicant or employee" against discrimination through "a contractual or other arrangement or relationship"). Although that definition is not controlling on the question here—by its terms, it applies directly only to subsection 12182(b)—there is no apparent reason, and certainly respondent has offered none, to think that Congress drafted subsection 12182(b) in unusually narrow terms in order to protect only a limited subset of the "individual[s]" more generally protected by Title III. Put another way, if it were so that Title III as a whole applies to persons providing goods or services at places of public accommodation, as well as to "clients or customers," it would be reasonable to expect Congress to protect *all of them* against potential discrimination by means of "contractual, licensing, or other arrangement[s]," and not limit that protection to clients and customers alone. Its failure to do so undercuts the theory that Title III broadly applies to regulate the requirements for "pursuit of a living." Pet. App. 8a.

It is also necessary to look more closely at the language describing what Title III seeks to assure: "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of [a] place of public accommodation." 42 U.S.C. § 12182(a). That language, on its face, gives no indication that it is concerned with either work-related terms and conditions or potential access to areas not open to the general public.[1] On the contrary, the most natural reading of the

[1] Respondent relies on *Daniel v. Paul*, 395 U.S. 298 (1969), to support the theory that public and non-public areas within a place of public accommodation are to be treated identically. The issue in *Daniel* had nothing to do with workers or work areas, however, but rather with members of the

words again seems to suggest that Congress meant to protect the clients and customers of places of public accommodation—that is, persons present as members of the general public—who (rather than workers) are more appropriately said to "enjoy[]" what the public accommodation has to offer. *See, e.g., Zimmerman v. Oregon Dept. of Justice*, 170 F.3d 1169 (9th Cir. 1999) (Title II does not apply to persons working at governmental facilities); *Cf.* Pet. 18 n.21 (citing cases in conflict with *Zimmerman*). For example, while individuals dining at a restaurant are presumably "enjoying" the goods or facilities of a public accommodation, it is a considerable stretch to fit that same language to persons working in the restaurant kitchen. This sensible reading of the statutory text is reinforced by the legislative history, which extensively discusses the application of Title III to patrons and other attendees at places of public accommodation, but not generally to persons working or otherwise seeking to work for the entities operating those accommodations. *See* H.R. Rep. No. 101-485, 101st Cong., 2d Sess. pt. 2, 99-129, pt. 3, 55-69 (1990) (House Report).

Respondent also fails to deal with the fact that any attempt to apply Title III across-the-board to persons working at places of public accommodation disrupts the overall structure of the Act, in particular the limitations embodied in Title I (the "Employment" title).[2] Although respondent baldly declares that

public seeking admission to a place of entertainment open to the general public. *See* 395 U.S. at 308. Furthermore, the Court in *Daniel*, in construing Title II of the Civil Rights Act, placed decisive weight on a definition of a covered public accommodation as "any establishment (A) * * * (ii) within the premises of which is physically located any [other] covered establishment, and (B) which holds itself out as serving patrons of such covered establishment." 395 U.S. at 303 (quoting 42 U.S.C. § 2000a(b)(4)). The Disabilities Act has no comparable provision.

[2] Respondent objects to this part of the argument, Br. in Opp. 9, saying that it was not made below. But petitioner has repeatedly argued, *inter alia*, that, even though golf courses are generally deemed to be places of public accommodation, Title III does not apply to the *competitions* conducted by the

"Congress extended the protections of Title III to all 'individuals' at public accommodations, regardless of Title I's potential applicability . . . ," Br. in Opp. 11, this *ipse dixit* comes without any supporting analysis. Most notably, respondent makes no attempt to explain why Congress would intentionally limit the reach of Title I to employees and to employers with at least 15 employees and then, proceeding in complete and utter silence, cut a large hole through that limitation by means of Title III. (As we have previously noted, Pet. 5-8, 13 n.17, respondent lost his Title I claim, because he is an independent contractor and not an employee of the Tour.) That unexplained revision, unlikely in and of itself, is all the more unlikely in light of the fact that the relevant Committee report took pains to say that Title III was not meant to address job-related practices. House Report, pt. 2, at 99. That report states unequivocally: "Title III is not intended to govern any terms or conditions of employment by providers of public accommodations or potential places of employment; employment practices are governed by title I of this legislation." *Id.*[3]

Tour, *see, e.g.*, Appellant's Opening Brief, C.A. 9, at 32 and note 22, a position that the Ninth Circuit expressly rejected. *See* Pet. App. 8a (finding no difference "between use of a place of public accommodation for pleasure and use in the pursuit of a living"). The argument about which respondent complains is merely "an argument in support of [that] claim . . ., not an independent claim." *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*, 120 S. Ct. 2180, 2187 n.2 (2000). This Court has recently reiterated that " '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.' " *Id.* (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)). *See also Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 378-79 (1995).

[3] Respondent cites four cases applying Title III, Br. in Opp. 6, three of which concern patrons of a public accommodation. The fourth case, *Menkowitz v. Pottstown Memorial Med. Ctr.*, 154 F.3d 113 (3d Cir. 1998), which was relied on by the Ninth Circuit below (Pet. App. 6a), does partially support the extension of Title III to suits by independent contractors at places

What respondent seems unwilling to acknowledge is that Congress had well-recognized reasons for limiting the Act to certain workers—*not* including independent contractors—and to certain covered employers. While Congress inarguably intended to grant broad new protections to disabled persons, including disabled workers, it recognized that the Act, like other anti-discrimination laws, would give rise to a significant increase in litigation. *See EEOC v. AIC Security Investigations, Inc.*, 55 F.3d 1276,1281 (7th Cir. 1995). Following its common practice, *see, e.g.*, Pet. 10-11, 15 (discussing limitations in other civil rights statutes), Congress elected not to extend the Act to all workers at all businesses. The Seventh Circuit has observed, for example, that the decision to limit the definition of covered entities to employers with at least 15 employees "struck a balance between the goal of stamping out all discrimination and the goal of protecting small entities from the hardship of litigating discrimination claims." *EEOC v. AIC Security Investigations, Inc.*, 55 F.3d at 1281. Likewise, and for similar reasons, Congress intentionally extended the substantive protections of the Act, and the concomitant right to sue, only to workers defined as employees (or prospective employees), not to persons working, or seeking to work, as independent contractors. Against this background, it is implausible to think that Title III added back what Title I quite deliberately left out.

This Court has taken up a number of issues regarding construction and application of the Disabilities Act, *see* Pet. 10 n.13, but it has not yet addressed in detail the intended scope of Title III. We submit that this case presents an appropriate opportunity. By treating competitors "inside the ropes" as indistinguishable from members of the general public "outside the ropes," the Ninth Circuit has read more into Title III than is

---

of public accommodation, albeit in the somewhat different context of doctors seeking to utilize hospital facilities. As the dissent in *Menkowitz* makes clear, however, the correctness of that decision, even on its own terms, is open to considerable doubt. *See id.* at 125-28 (Scirica, J., dissenting).

actually there. Not only does its decision erase any distinction between public and non-public spaces, it also, as respondent freely admits, throws open the Title III door to work-related claims by any person working at any place of public accommodation. *See* Br. in Opp. 9-11. Furthermore, by providing an alternative avenue for those claims, it has the corollary effect of releasing potential litigants from any obligation to comply with the procedural requirements imposed by Title I. *See* Pet. 19. This is not at all what Title III was meant to do, and further review by this Court is warranted.

2. The second question before the Court is whether Title III (if applicable) compels professional sports organizations to modify their substantive competitive rules to accommodate disabled competitors. Respondent, like the Ninth Circuit below, takes the position that the answer to this question depends upon a fact-intensive analysis in each case, weighing the relative importance of the specific rule against the "individual circumstances" of the disabled athlete. Br. in Opp. 14. But this "chancellor's-foot" approach distorts the proper statutory inquiry: to determine whether a proposed modification (waiver of a substantive rule) would "fundamentally alter the nature" of a particular good or service (the athletic competition), *see* 42 U.S.C. § 12182(b)(2)(A)(ii), the inquiry must focus primarily on the nature of the good or service. Had the Ninth Circuit (like the Seventh Circuit) given proper weight to that part of the equation, it would have recognized that the highest-level Tour competitions (the particular "good" or "service" here), like any other elite sports competition, must be able to test competitors according to a uniform set of substantive rules. That need to assess performance under uniform rules, inseparable from the very nature of elite competitive athletics, does *not* vary with the "individual circumstances" of a particular athlete.

The decisions of the Ninth and Seventh Circuits on this issue cannot be reconciled. Although respondent seeks to emphasize the factual records in the two cases, Br. in Opp. 24-27, the

conflicting opinions rest, at bottom, upon two mutually incompatible approaches to the question whether, at the highest level of competitive athletics, it is critical (and thus, under the Act, permissible) for a governing organization to hold all competitors, including disabled competitors, to the same substantive rules. The Seventh Circuit looked to whether equality of treatment was essential and, finding that it was, *see Olinger*, 205 F.3d at 1006 (stating that evidence "supports the golf community's insistence that all players play all tournaments under the same conditions and rules"), it rejected the idea that it should nevertheless examine the "personal circumstances" (205 F.3d at 1005) of the particular disabled athlete, on a case-by-case basis, to decide whether he ought to be allowed to compete without full compliance. The Ninth Circuit took just the opposite tack. Paying no heed to the necessity for uniform substantive rules, it held that it was appropriate, in each case, to make an "individual determination" whether the disabled athlete, if granted a waiver, would gain a competitive advantage. Pet. App. 11a-15a. Asking a very different question, the Ninth Circuit, not surprisingly, reached a very different answer.[4]

Respondent challenges (Br. in Opp. 22-23) the need for standardized rules, saying that the view adopted by the Seventh Circuit would allow professional sports organizations, merely by making up arbitrary rules, to exempt themselves from the Act. But that assertion is incorrect. The Seventh Circuit did not just accept that uniform adherence to the "walking rule" was necessary without more. Rather, it examined the record both to determine that the rule was not a pretext for discrimination and

[4] It is worth noting that, in the course of making this "individual determination," the courts below did not conclude that the fatigue occasioned by four days of walking has *no* effect on Tour competitions. *See* Pet. App. 10a (quoting district-court finding). To the contrary, the relevant finding ("cannot be deemed significant under normal circumstances") necessarily acknowledges that fatigue is significant under some circumstances and that it may always have at least some effect.

to assure that the rule (and thus a waiver of the rule) could actually affect performance in the competition. At the same time, however, the Seventh Circuit properly took account (as the Ninth Circuit did not) that professional sports organizations have a greater need for uniformity in the application of their rules and regulations than entities that do not, by their very nature, seek precisely to measure and reward differences in physical performance.[5] It is just that sort of situation—where the need for consistent application of certain policies or practices is overriding—that the "fundamentally alter" language is meant to allow for. *See* Pet. 23-24.

Respondent asserts, however, that the Tour does not really need to apply the "walking rule" uniformly, offering as proof the fact that it sponsors certain tournaments in which players can either walk or use golf carts. Br. in Opp. 16-19. But respondent is mixing up two points. To be clear: there are no Tour-sponsored tournaments at which different players are allowed to play by different substantive rules. What respondent refers to are simply events where the Tour does not employ the "walking rule" and where each golfer, not being bound by any rule on the subject, thus may choose how to get around the course. All that demonstrates, of course, is that golf tournaments can be played without a walking requirement, a fact that the Tour readily acknowledges. That has no bearing on the issue here. The

[5] We thus agree with respondent that "individual determination[s]" may be appropriate even at this stage of the inquiry—as, of course, they are in deciding the earlier question whether a particular modification is reasonable—depending upon the nature of the good or service in question. *See* Br. in Opp. 25-27; *see also Washington v. Indiana High Sch. Athletic Ass'n*, 181 F.3d 840 (7th Cir.), *cert. denied*, 120 S. Ct. 579 (1999). In *Washington*, for example, the court of appeals noted that the association had already provided for selective waivers of its eligibility rule, thus demonstrating that uniform application of the rule was *not* necessary to preserve the essential nature of high school competition. In those circumstances, there was no evident reason not to make the same accommodation for qualified disabled athletes.

highest-level Tour events (the "good" or "service" that respondent is suing about) are very different: like every other comparable tournament throughout the world, those tournaments invariably require, and have always required, that all golfers walk the golf course at all times. *See* Pet. App. 31a (opinion of the district court) ("[n]o waiver [of the "walking rule"] has ever been granted for individualized circumstances (such as disability)").

Finally, although respondent tries to belittle the importance of this case, Br. in Opp. 28-30, he appears to accept that the decision below is, in fact, without precedent. Until now no court had ever ordered a professional sport to let some athletes, disabled or not, compete under a less demanding set of substantive rules. This novel mandate is made all the more striking, of course, by the contrary decision of the Seventh Circuit, handed down the very next day, rejecting an identical request. Furthermore, the issue having been joined, it is unlikely to go away: given the high public profile of the cases, it is reasonable to expect that additional requests for waivers, in golf and in other sports as well, will follow. *See Jones v. United States Golf Ass'n*, No. A-00-CA-278 JN (W.D. Tex., June 15, 2000) (successfully challenging enforcement of the "walking rule" by the USGA). In any event, it remains the fact that two federal courts of appeals have rendered conflicting decisions on an important question regarding application of the Americans with Disabilities Act, a question for which there should be a single answer. We ask this Court to provide that answer.

CONCLUSION

The petition for a writ of certiorari should be granted.

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(15)

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 5, 2000
CERTIORARI GRANTED SEPTEMBER 26, 2000

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US COURT OF APPEALS
FOR THE NINTH CIRCUIT

98-35309

CASEY MARTIN
Plaintiff-Appellee

v.

PGA TOUR INC.,
a Maryland corporation
Defendant-Appellant

DOCKET ENTRIES

DATE	PROCEEDINGS
3/25/98	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): NO. Setting schedule as follows: appellant's designation of RT is due 3/30/98; appellee's designation of RT is due 4/9/98; appellant shall order transcript by 4/20/98; court reporter shall file transcript in DC by 5/20/98; certificate of record shall be filed by 5/27/98; appellant's opening brief is due 7/6/98; appellees' brief is due 8/5/98; appellants' reply brief is due 8/19/98; [98-35309] (sm) [98-35309]
3/25/98	Filed George J. Cooper for Appellant PGA Tour, Inc. Civil Appeals Docketing Statement served on 3/20/98 (to CONFATT) [98-35309] [98-35309] (sm) [98-35309]
4/2/98	Filed order CONFATT (LW) Case referred to Confatt for assessment conference only. Conference to be on 4/28/98 at 2:00 pm pacific, by phone. [98-35309] (em) [98-35309]

DATE	PROCEEDINGS
4/16/98	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N) : NO. Setting cross appeal briefing schedule as follows: appellant's designation of RT is due 4/16/98 in 98-35367; appellee's designation of RT is due 4/27/98 in 98-35367; appellant shall order transcript by 5/6/98 in 98-35367; court reporter shall file transcript in DC by 6/8/98 in 98-35367; certificate of record shall be filed by 6/15/98 in 98-35367; first cross-appeal brief is due 7/6/98; second cross-appeal brief is due 8/17/98; third cross-appeal brief is due 9/16/98; optional cross-appeal reply brief is due 9/30/98 [98-35367, 98-35309] (sm) [98-35309 98-35367]
6/3/98	Filed order CONFATT (CG) The court is advised that pltf does not intend to pursue his cross-appeal. Unless objection is filed within 14 days of the filing date of this order, appeal no. 98-35367 will be deemed dismissed voluntarily pursuant to FRAP 42b. with each side bearing its own costs. Dismissal will be without prejudice to pltf's pursuing any alternative grounds for affirmance in his brief in the primary appeal. A copy of any objection should be served on the mediator in Seattle. Case not selected for- program. Briefing schedule previously set by the court is vacated. In appeal no. 98-35309, appellants' brief, excerpts of record are due 7/7/98 ; appellees' brief due 8/18/98 ; appellants' reply brief due 9/16/98 [98-35309] (em) [98-35309 98-35367]

DATE	PROCEEDINGS
6/29/98	recd notice of appearance of Roy Reardon as counsel for plaintiff Casey Martin [98-35309, 98-35367} (em) [98-35309 98-35367]
7/6/98	Filed original and 15 copies U.S. Golf Association amicus brief of 39 pages ; served on 7/2/98 (Note: see addendum to brief re consent of parties) [98-35309, 98-35367] (em) [98-35309]
7/8/98	Filed original and 15 copies Appellant PGA Tour, Inc. in 98-35309 opening brief (Informal: n) 53 pages and five excerpts of record in 1volumes; served on 7/6/98 [98-35309] (em) [98-35309]
8/17/98	Filed certificate of record on appeal RT filed in DC NT [98-35309, 98-35547] (em) [98-35309 98-35547]
8/18/98	Filed original and 15 copies amicus Klippel-Trenaunay in 98-35309's brief of 35 pages served on 8/17/98 (see stipulation consenting to filing of amicus at back of brief) [98-35309] (em) [98-35309]
8/19/98	Filed original and 15 copies appellee Casey Martin in 98-35309's 62 pages brief, 2 Exc. vols; served on 8/17/98 [98-35309] (em) [98-35309]
8/21/98	Filed original and 15 copies USA's amicus brief of 37 pages; served on 8/18/98 [98-35309] (em) [98-35309]
8/24/98	Received letter dated 8/17/98 from U.S. Senators Tom Harkin and Bob Dole re: supporting Pltf/aple Casey Martin's Brief. (RECORDS FOR MERITS PANEL) [98-35309] (em) [98-35309]

DATE	PROCEEDINGS
8/24/98	Received letter dated 8/21/98 from American Association on Mental Retardation et al, re: supporting pltf/aple Casey Martin. RECORDS FOR MERITS PANEL [98-35309] (em) [98-35309]
8/25/98	Received from Western Law Center for Disability Rights letter dated 8/17/98 re: supporting amicus brief filed by Klippel-Trenaunay; served 8/17/98 RECORDS FOR MERITS PANEL [98-35309] (em) [98-35309]
9/1/98	Filed motion of defendant and deputy clerk order: Deputy Clerk: CB) Deft's motion to consolidate nos. 98-35309 and 98-35509 is granted. The three above-captioned appeals shall be calendared before the same panel for disposition. The current briefing schedules remain in effect in 98-35309, 98-35509, 98-35547 (Motion recvd 8/27/98) [98-35309, 98-35509, 98-35547] (em) [98-35309, 98-35509 98-3554 7]
9/21/98	Filed original and 15 copies PGA Tour, Inc. in 98-35309 reply brief, (Informal: n) 40 pages; served on 9/16/98 [98-35309] (em) [98-35309]
10/2/98	Filed Casey Martin in 98-35309 additional citations, served on 10/1/98 RECORDS FOR MERITS PANEL [98-35309] (em) [98-35309]
10/9/98	Filed Appellant PGA Tour, Inc.'s motion to strike whole of the aple's addl cites, served on 10/6/98 [WIP/PRO..O] [98-35309] (ot) [98-35309]

DATE	PROCEEDINGS
10/16/98	Filed order (Deputy Clerk: cag) Appellant's motion to strike appellee's supplemental citation of authority is GRANTED. Appellee's previously received supplemental citation of authority shall be stricken. Within 14 days from the date of this order, appellee may resubmit supplemental citations which comply with FRAP 28 (j). [3544333-1] [98-35309, 98-35367, 98-35547] (sm) [98-35309 98-35367 98-35547]
10/21/98	Received Casey Martin's additional citations, served on 10/20/98 (RECORDS FOR MERIT PANEL) [98-35309] (sm) [98-35309]
11/17/98	Filed PGA Tour, Inc. additional citations, served on 11/11/98 RECORDS FOR MERITS PANEL [98-35309, 98-35509] (em) [98-35309 98-35509]
1/12/99	Received Roy L. Reardon for Appellee Casey Martin in 98-35309 letter dated 1/11/98 re: counsel Reardon who will argue for aple Casey Martin, will not be available for oral argument prior to 3/15/99 because he will be out of the country until that date. (CALENDAR) [98-35509, 98-35367, 98-35509, 98-35547] (em) [98-35309 98-35367 98-35509 98-35547]
3/1/99	Calendar check performed [98-35309, 98-35509] (aw) [98-35309 98-35509]
3/8/99	Calendar materials being prepared. [98-35309, 98-35509] [98-35309, 98-35509] (aw) [98-35309 98-35509]
3/15/99	CALENDARED: Portland May 4, 1999 9:00 a.m. [98-35309, 98-35509] (mw) [98-35309 98-35509]

DATE	PROCEEDINGS
4/12/99	Filed Amicus USA in 98-35309's motion to participate in oral argument and extend time for oral argument [98-35309] served on 4/9/99 [3651998] FAXED PANEL (em) [98-35309]
4/13/99	Filed order (Deputy Clerk: GB) The unopposed motion by amicus USA is granted. Oral argument by the parties shall be extended to 25 minutes per side. The US shall be permitted to use 10 minutes of aple's argument time. (phoned out) [98-35309, 98-35509] (em) [98-35309 98-35509]
4/16/99	Filed Casey Martin in 98-35309 motion to supplement the supplemental excerpts of record; or alternatively, for court to request pltf's trial exhibit 98; with enclosed video (5 copies); served 4/15/99 FEDEX PANEL w/copy of video. [98-35309] (em) [98-35309]
4/22/99	Filed Appellant PGA Tour, Inc. in 98-35309 response opposing appellee's motion to supplement record on appeal [3655649-1] served on 4/19/99 FAXED PANEL on 4/26/99 (Note: earlier received in promo) [98-35309] (em) [98-35309]
4/23/99	Filed order (Deputy Clerk: GB) Aple's motion to supplement the record with the videotape is granted. (phoned out) [98-35309, 98-35509] (em) [98-35309 98-35509]
5/4/99	ARGUED AND SUBMITTED TO William C. CANBY, Thomas G. NELSON, Jeremy Fogel [98-35309, 98-35509] (br) [98-35309 98-35509]
5/24/99	Filed PGA Tour, Inc. in 98-35309 and in 98-35509 additional citations, served on 5/21/99 FEDEX PANEL [98-35309 98-35509] (em) [98-35309 98-35509]

DATE	PROCEEDINGS
5/26/99	Filed Casey Martin in 98-35309 and in 98-35509 additional citations, served on 5/24/99 FEDEX PANEL [98-35509, 98-35509] (em) [98-35309 98-35509]
2/18/00	Filed PGA Tour, Inc. in 98-35309 additional citations, served on 2/17/00 FAXED PANEL [98-35309] (em) [98-35309]
3/6/00	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. William C. CANBY, author; Thomas G. NELSON; Jeremy Fogel.) FILED AND ENTERED JUDGMENT. [98-335309, 98-35509] (em) [98-35309 98-35509]
3/20/00	Filed Appellee Casey Martin in 98-35309 and in 98-35509 bill of costs, served on 3/17/00 [98-35309, 98-35509] (em) [98-35309 98-35509]
3/28/00	MANDATE ISSUED; COSTS TAXED FOR $1,385.00 [98-35309, 98-35509] (em) [98-35309 9-35509
4/3/00	Filed Casey Martin's motion to for attorney(s)' fees served on 3/31/00 [3881717] (to PANEL on 04/18/00) (mhf) [98-35309 98-35509]
4/17/00	Filed Appellant PGA Tour, Inc.'s response opposing appellee's motion for attorneys' fees [3881717-1] served on 4/14/00 (PANEL) [98-35309] (sm) [98-35309]
4/20/00	Filed Appellee Casey Martin's reply memorandum in support of appellee's motion for attorneys' fees [3881717-1], served on 4/19/00 (PANEL) [98-35309, 98-35509] (sm) [98-35309 98-35509]

DATE	PROCEEDINGS
4/26/00	Filed order (William C. CANBY, Thomas G. NELSON & Jeremy Fogel) plaintiff-aple Casey Martin is awarded atty's fees on appeal. The determination of an appropriate amount of fees on appeal is referred to the court's special master, Appellate Commissioner Peter L. Shaw, who shall conduct whatever proceedings he deems appropriate, and who shall have authority to enter an order awarding fees. The order is subject to reconsideration by the panel. [98-35309, 98-35509] (jr) [98-35309 98-35509]
5/22/00	Filed Supreme Court order (SC Date: 5/17/00): The application for an extension of time within which to file a petition for a writ of certiorari has be presented to Justice O'Connor, who on 05/17/99 extended the time to and including 07/05/00. (CASEFILE) [98-35309, 98-35509] (sm) [98-35309 98-35509]
7/10/00	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 00-24 filed on 7/5/00. [98-35509, 98-35509] (em) [98-35309 98-35509]
7/27/00	Filed order (Appellate Commissioner) On 3/6/00 the court affirmed the DC's judgment that the ADA applies to participation by a disabled person in a sports competition sponsored by a private, nonprofit organization. (CITES) In an order filed 4/26/00 the court referred pltf-aplt Martin's motion for atty. fees to the Appellate Commissioner for determination. Martin seeks atty. fees pursuant to section 12205 of the ADA which provides for an award of atty. fees to a "prevailing party". On 7/5/00, deft aple PGA Tour, Inc.

DATE	PROCEEDINGS
	filed a petition for a writ of certiorari in the Supreme Court. Accordingly, Martin's motion for atty. fees shall be held in abeyance pending the disposition of PGA Tour's petition for cert. and, if petition is granted, the Supreme Court's decision. Within 14 days after Supreme Court's denial of the petition, or, if the petition is granted, the judgment, Martin shall file a status report in this court and move to renew or withdraw the motion for atty. fees. The clerk shall forward Martin's status report and motion to the Appellate Commissioner.) ( ) [98-35309, 98-35509] (em) [98-35309 98-35509]
10/2/00	Received notice from Supreme Court, petition for certiorari GRANTED on 9/26/00. Supreme Court No. 00-24 (PANEL & App. com) (em) [98-35309 98-35509]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

97-CV-6309

CASEY MARTIN

Plaintiff

v.

PGA TOUR INC.,
a Maryland corporation

Defendant

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
11/26/97	1	COMPLAINT and JURY TRIAL DEMAND (Cause Code: 42:12101) Receipt # 162918) (ctw*)
11/26/97	2	SUMMONS ISSUED as to Defendant PGA Tour, Inc (ctw*)
11/26/97	3	MOTION by Plaintiff Casey Martin FOR TEMPORARY RESTRAINING ORDER, FOR PRELIMINARY INJUNCTION Oral Argument Requested (ctw*)
11/26/97	4	AFFIDAVIT by Plaintiff of Casey Martin re: MOTION FOR TEMPORARY RESTRAINING ORDER [3-1], MOTION FOR PRELIMINARY INJUNCTION [3-2] (ctw*)
11/26/97	5	AFFIDAVIT by Plaintiff Casey Martin of William Wiswall re: MOTION FOR TEMPORARY RESTRAINING ORDER, [3-1]

DATE		PROCEEDINGS
		MOTION FOR PRELIMINARY INJUNCTION [3-2] (ctw*)
11/26/97	6	RECORD OF ORDER by Judge Thomas M. Coffin SETTING MOTION FOR TEMPORARY RESTRAINING ORDER [3-1] on oral argument calendar of 1:30 11/28/97, SETTING MOTION FOR PRELIMINARY INJUNCTION [3-2] on oral argument calendar of 1:30 11/28/97 (counsel notified) (ctw*)
11/26/97	7	ORDER Discovery Schedule discovery ddl set for 3/26/98 pretrial order deadline set for 4/27/98 (ctw*)
11/28/97	8	MOTION by Defendant PGA Tour Inc TO DISMISS, TO CHANGE VENUE (ctw*) [Entry date 12/01/97]
11/28/97	9	RECORD OF PROCEEDINGS before Judge Thomas M. Coffin DENYING MOTION TO DISMISS [8-1] DENYING MOTION TO CHANGE VENUE [8-2], GRANTING MOTION FOR PRELIMINARY INJUNCTION [3-2] (counsel notified) Court Rptr Amanda Essner (ctw*) [Entry date 12/01/97]
12/8/97	10	ORDER by Judge Thomas M. Coffin MOTION FOR PRELIMINARY INJUNCTION [3-2]: Defendant is enjoined and required to permit plaintiff to use a golf cart during the practice and competitive rounds of the 1997 PGA Tour Qualifying Tournament Final Stage to be held in Orland Florida on 12/1-

DATE		PROCEEDINGS
		12/8/97 Signed 12/8/97, nunc pro tunc 11/28/97 (counsel notified) (ctw*)
12/15.97	11	APPLICATION by Defendant PGA Tour Inc FOR ATTORNEY William J. Maledon and Scott W. Rodgers TO APPEAR PRO HAC VICE (ctw*)
12/15/97	12	ORDER by Judge Thomas M. Coffin GRANTING MOTION FOR ATTORNEY William J. Maledon and Scott W. Rodgers TO APPEAR PRO HAC VICE [11-1], GRANTING MOTION [11-2] Signed 12/15/97 (counsel notified) (ctw*)
12/19/97	13	AMENDED COMPLAINT [1-1] and JURY TRIAL DEMAND by Plaintiff Casey Martin (sln*)
12/22/97	14	STIPULATED PROTECTIVE ORDER see formal order Signed 12/22/97 Judge Thomas N. Coffin (counsel notified) (sln*)
12/22/97	15	STIPULATION re: preliminary injunction (sln*)
12/22/97	16	STIPULATED MOTION FOR EXTENSION OF TIME 12/30/97 WITHIN WHICH TO APPEAR (sln*) [Entry date 12/23/97]
12/23/97	17	ORDER by Judge Thomas M. Coffin GRANTING MOTION FOR EXTENSION OF TIME 12/30/97 WITHIN WHICH TO APPEAR [16-1] Signed 12/22/97 (counsel notified) (sln*)

DATE		PROCEEDINGS
12/23/97	18	ORDER by Judge Thomas M. Coffin GRANTING stipulation [15-1] Signed 12/23/97 (counsel notified) (sln*)
12/24/97	19	ANSWER by Defendant PGA Tour Inc to complaint [13-1] (ctw*) [Entry date 12/30/97]
12/24/97	20	MOTION by Defendant PGA Tour Inc FOR SUMMARY JUDGMENT Oral Argument Requested (ctw*) [Entry date 12/30/97]
12/24/97	21	MEMORANDUM IN SUPPORT by Defendant PGA Tour Inc of MOTION FOR SUMMARY JUDGMENT [20-1] (ctw*) [Entry date 12/30/97]
12/24/97	22	CONCISE STATEMENT OF MATERIAL FACTS by Defendant PGA Tour Inc in support of MOTION FOR SUMMARY JUDGMENT [20-1] (ctw*) [Entry date 12/30/97]
12/24/97	23	AFFIDAVIT by Defendant PGA Tour Inc of Edward L. Moorhouse re: MOTION FOR SUMMARY JUDGMENT [20-1] (ctw*) [Entry date 12/30/97]
12/30/97	24	RECORD OF ORDER by Judge Thomas M. Coffin SETTING MOTION FOR SUMMARY JUDGNENT [20-1] on oral argument calendar of 10:00 1/26/98 (counsel notified) (ctw*)
12/31/97	25	AFFIDAVIT by Defendant PGA Tour Inc of Edward L. Moorhouse (ctw*) [Entry date 01/05/98)

DATE		PROCEEDINGS
12/31/97	26	MOTION by Plaintiff Casey Martin TO EXTEND TIME 10 DAYS TO FILE RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [20-1] Expedited hearing requested (ctw*) [Entry date 01/05/98)
12/31/97	27	MEMORANDUM IN SUPPORT by Plaintiff Casey Martin of MOTION TO EXTEND TIME 10 DAYS TO FILE RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [20-1] [26-1] (ctw*) [Entry date 01/05/98]
12/31/97	28	AFFIDAVIT by Plaintiff Casey Martin of Martha L. Walters re: MOTION TO EXTEND TIME 10 DAYS TO FILE RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [20-1] [26-1] (ctw*) [Entry date 01/05/98]
1/5/98	29	RECORD OF ORDER by Judge Thomas M. Coffin SETTING MOTION TO EXTEND TIME 10 DAYS TO FILE RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [20-1] [26-1] Telephone argument set for 10:00 1/6/98 (counsel notified) (ctw*)
1/5/98	30	RESPONSE by Defendant PGA Tour Inc to MOTION TO EXTEND TIME 10 DAYS TO FILE RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [20-1] [26-1] (ctw*) [Entry date 01/06/98]

DATE		PROCEEDINGS
1/5/98	31	MOTION by Defendant PGA Tour Inc FOR PROTECTIVE ORDER (ctw*) [Entry date 01/06/98]
1/6/98	32	RECORD OF PROCEEDINGS before Judge Thomas M. Coffin DENYING MOTION TO EXTEND TIME 10 DAYS TO FILE RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [20-1] [26-1] Plaintiff is allowed until 1/21/98, to file response; defendant allowed until 1/26/98, to file a reply. Motion [20] for summary judgment to remain set 1/26/98. SETTING MOTION FOR PROTECTIVE ORDER [31-1] Telephone argument set for 9:00 1/9/98 pretrial order ddl set for 1/21/98 pretrial conference set for 10:00 1/26/98 3 day jury trial set for 1:30 2/2/98 in Eugene, Pretrial documents due 1/21/98 (counsel notified) Court Rptr Kristi Anderson (ctw*)
1/8/98	33	RECORD OF ORDER by Judge Thomas M. Coffin Pursuant to plaintiff's oral waiver of jury trial, Jury trial stricken 3 day court trial set for 1:30 2/2/98 Eugene (counsel notified) (ctw*)
1/9/98	34	RECORD OF PROCEEDINGS before Judge Thomas M. Coffin GRANTING MOTION FOR PROTECTIVE ORDER [31-1] to the extent that the parties are to identify two board members whose depositions are to be taken telephonically. The depositions are to last no longer than 1 hour each. (counsel notified) Court Rptr Kristi Anderson (ctw*)

DATE		PROCEEDINGS
1/20/98	35	MOTION by Plaintiff Casey Martin TO EXCEED PAGE LIMITATION Expedited ruling requested (ctw*)
1/20/98	36	AFFIDAVIT by Plaintiff Casey Martin of Martha Walters re: MOTION TO EXCEED PAGE LIMITATION [35-1] (ctw*)
1/20/98	37	MOTION by Plaintiff Casey Martin TO EXTEND TIME TO 1/28/98, TO FILE TRIAL MEMORANDUM Expedited ruling requested (ctw*)
1/20/98	38	AFFIDAVIT by Plaintiff Casey Martin of Martha Walters re: MOTION TO EXTEND TIME TO 1/28/98, TO FILE TRIAL MEMORANDUM [37-1] (ctw*)
1/20/98	39	RECORD OF ORDER by Judge Thomas M. Coffin GRANTING MOTION TO EXCEED PAGE LIMITATION [35-1] (counsel notified) (ctw*) [Entry date 01/21/98]
1/21/98	40	RECORD OF ORDER by Judge Thomas M. Coffin GRANTING MOTION TO EXTEND TIME TO 1/28/98, TO FILE TRIAL MEMORANDUM [37-1] (counsel notified) (ctw*)
1/21/98	41	MOTION by Plaintiff Casey Martin TO EXTEND TIME TO FILE PRETRIAL ORDER, WITNESS LIST AND EXHIBIT LIST (ctw*)
1/21/98	42	EXHIBIT LIST by Defendant PGA Tour Inc (ctw*)

DATE		PROCEEDINGS
1/21/98	43	WITNESS LIST by Defendant PGA Tour Inc (ctw*)
1/21/98	44	MOTION by Plaintiff Casey Martin FOR PARTIAL SUMMARY JUDGMENT (ctw*) [Entry date 01/22/98]
1/21/98	45	MEMORANDUM IN SUPPORT by Plaintiff Casey Martin of MOTION FOR PARTIAL SUMMARY JUDGMENT [44-1] (ctw*) [Entry date 01/22/98]
1/21/98	46	CONCISE STATEMENT OF MATERIAL FACTS by Plaintiff Casey Martin in support of MOTION FOR PARTIAL SUMMARY JUDGMENT [44-1] (ctw*) [Entry date 01/22/98]
1/21/98	47	AFFIDAVIT by Plaintiff Casey Martin of Martha Walters re: MOTION FOR PARTIAL SUMMARY JUDGMENT [44-1] (ctw*) [Entry date 01/22/98]
1/21/98	48	AFFIDAVIT by Plaintiff Casey Martin of Casey Martin IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT [20-1] (ctw*) [Entry date 01/22/98]
1/21/98	49	RECORD OF ORDER by Judge Thomas M. Coffin GRANTING MOTION TO EXTEND TIME TO FILE PRETRIAL ORDER, WITNESS LIST AND EXHIBIT LIST [41-1] pretrial order ddl set for 1/22/98 (counsel notified) (ctw*) [Entry date 01/22/98]
1/22/98	50	RECORD OF ORDER by Judge Thomas M. Coffin SETTING MOTION FOR

DATE		PROCEEDINGS
		PARTIAL SUMMARY JUDGMENT [44-1] on oral argument calendar of 10:00 1/26/98 (counsel notified) (ctw*)
1/22/98	51	MOTION TO FILE AMICUS BRIEF US Golf Association Expedited ruling requested c-TC (ctw*)
1/22/98	52	NOTICE of taking deposition by Plaintiff Casey Martin of Steven Nosler on 1/26/98 (ctw*)
1/22/98	53	EXHIBITS TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [44-1] located in box found at CRD desk. (ctw*)
1/22/98	54	AMENDED MEMORANDUM IN SUPPORT by plaintiff Casey Martin of MOTION FOR PARTIAL SUMMARY JUDGMENT [44-1] ,AND OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [20-1] (ctw*)
1/22/98	55	EXHIBIT LIST by Plaintiff Casey Martin (ctw*)
1/22/98	56	WITNESS LIST by Plaintiff Casey Martin (ctw*)
1/23/98	—	LODGED PRETRIAL ORDER (ctw*)
1/23/98	57	RECORD OF ORDER by Judge Thomas M. Coffin GRANTING MOTION TO FILE AMICUS BRIEF US Golf Association [51-1] Amicus US Golf Association (counsel notified) (ctw*)

DATE		PROCEEDINGS
1/23/98	58	WITNESS STATEMENT OF DONALD C. JONES, M.D. FILED by Plaintiff Casey Martin (ctw*)
1/23/98	59	WITNESS STATEMENT OF GARY A. KLUG PHD FILED by Plaintiff Casey Martin (ctw*)
1/26/98	60	REPLY TO RESPONSE by Defendant PGA Tour Inc re [44-1] MOTION FOR PARTIAL SUMMARY JUDGMENT, AND RESPONSE TO [20-1] MOTION FOR SUMMARY JUDGMENT (ctw*)
1/26/98	61	CONSENT TO Judge Thomas M. Coffin by Plaintiff, Defendant (ctw*)
1/26/98	62	SUPPLEMENTAL MEMORANDUM ON ISSUE OF EMPLOYMENT STATUS by Plaintiff Casey Martin (ctw*)
1/26/98	63	MEMORANDUM by Amicus US Golf Association Amicus Curiae (ctw*)
1/27/98	64	RECORD OF PROCEEDINGS before Judge Thomas M. Coffin GRANTING IN PART AND DENYING IN PART MOTION FOR PARTIAL SUMMARY JUDGMENT [44-1] Granted on the issue of private club and public accommodation and denied without prejudice as to the remainder of the motion, DENYING MOTION FOR SUMMARY JUDGMENT [20-1] Pre trial conference held in chambers 1/26/98 (counsel notified) Court Rptr Kristi Anderson (ctw*)

DATE		PROCEEDINGS
1/28/98	65	TRIAL MEMORANDUM by Plaintiff Casey Martin (ctw*) [Entry date 01/29/98]
1/29/98	66	TRIAL MEMORANDUM by Defendant PGA Tour Inc (ctw*)
1/29/98	—	AMENDMENT TO JOINT PRETRIAL ORDER (ctw*)
1/29/98	67	AMENDMENT by Defendant PGA Tour Inc to joint Pretrial Order (sln*) [Entry date 01/30/98]
1/30/98	68	PRETRIAL ORDER approved by Judge Thomas M. Coffin Signed 1/30/98 (counsel notified) (sln*)
1/30/98	69	ORDER by Judge Thomas M. Coffin GRANTING IN PART AND DENYING PART MOTION FOR PARTIAL SUMMARY JUDGMENT [44-1], DENYING MOTION FOR SUMMARY JUDGMENT [20-1] Signed 1/30/98 (counsel notified) (ctw*) [Entry date 02/02/98]
2/2/98	70	RESPONSE by Plaintiff Casey Martin to MOTION IN LIMINE (ctw*)
2/2/98	71	AMENDED EXHIBIT LIST by Plaintiff Casey Martin (ctw*)
2/2/98	72	REVISED EXHIBIT LIST by Defendant PGA Tour Inc (ctw*)
2/2/98	73	DEPOSITION DESIGNATIONS by Defendant PGA Tour Inc (ctw*)
2/2/98	74	REVISED DEPOSITION DESIGNATIONS by Defendant PGA Tour Inc (ctw*)

DATE		PROCEEDINGS
2/2/98	75	MOTION by Defendant PGA Tour Inc IN LIMINE (ctw*)
2/2/98	76	SECOND AMENDED EXHIBIT LIST by Plaintiff Casey Martin (ctw*)
2/2/98	77	RECORD OF PROCEEDINGS before Judge Thomas M. Coffin Conference held in chambers. Order DENYING MOTION IN LIMINE [75-1] COURT TRIAL BEGINS 1:30 2/2/98, Ordered trial continued to 2/3/98, at 9:00 a.m. (counsel notified) Court Rptr Kristi Anderson (ctw*) [Entry date 02/03/98]
2/3/98	78	RECORD OF PROCEEDINGS before Judge Thomas M. Coffin COURT TRIAL CONTINUATION - day 2. Trial continued to 2/4/98, at 9:00 (counsel notified) Court Rptr Kristi Anderson/Sharon Gorham (ctw*)
2/4/98	79	RECORD OF PROCEEDINGS before Judge Thomas M. Coffin COURT TRIAL continues. Ordered trial continued to 2/5/98 at 9:00 (counsel notified) Court Rptr Kristi Anderson/Sharon Gorham (ctw*) [Entry date 02/05/98]
2/5/98	80	SUPPLEMENTAL MEMORANDUM ON ISSUE OF EMPLOYEE-EMPLOYER RELATIONSHIP by Plaintiff Casey Martin (ctw*)
2/5/98	81	RECORD OF PROCEEDINGS before Judge Thomas M. Coffin Court trial held (4th day). Ordered trial continued to

DATE		PROCEEDINGS
		2/10/98, at 8:30 a.m. (counsel notified) Court Rptr Kristi Anderson/ Sharon (ctw*)
2/10/98	82	THIRD AMENDED EXHIBIT LIST by Plaintiff Casey Martin (ctw*)
2/10/98	83	RESPONSE by Defendant PGA Tour Inc re plaintiff's supplemental memorandum on issue of employee/employer relationship [80-1] (ctw*)
2/10/98	84	RECORD OF ORDER by Judge Thomas M. Coffin COURT TRIAL CONTINUED TO 2/11/98, AT 8;30 (counsel notified) Court Rptr Kristi Anderson/Sharon Gorham (ctw*)
2/10/98	85	CLERK'S LIST OF EXHIBITS AND WITNESSES (ctw*)
2/11/98	86	ORDER by Judge Thomas M. Coffin The parties are to retain custody of their respective exhibits until such time as all need for the exhibits has terminated (counsel notified) (ctw*)
2/12/98	87	RECORD OF PROCEEDINGS before Judge Thomas M. Coffin COURT TRIAL ENDS Court finds in favor of plaintiff and against defendant. Written opinion to follow. (counsel notified) Court Rptr Kristi Anderson/Sharon Gorham (ctw*)
2/19/98	88	FINDINGS OF FACT and CONCLUSIONS OF LAW: The requested accommodation of a cart is eminently reasonable in light of Casey Martin's disability. (See formal order) by Judge Thomas M. Coffin s/

DATE		PROCEEDINGS
		TMC 2/19/98 (cc: Counsel notified) (ctw*) [Entry date 02/20/98]
2/20/98	89	ERRATA to findings of fact [88-1] (ctw*)
3/3/98	90	TRANSCRIPT of proceedings held 11/28/98 before Judge Thomas M. Coffin court reporter: Amanda Essner (ctw*)
3/4/98	91	JUDGMENT FOR PERMANENT INJUNCTION Judgment is entered in favor of plaintiff Casey Martin, and against defendant PGA, on count 1 of plaintiff's amended complaint alleging that the PGA Tour is a place of public accommodation and that it discriminated against plaintiff in violation of Title III of the ADA by failing to provide him with automotive transportation in competitions in which plaintiff is eligible to participate. Judgment is entered in favor of PGA and against plaintiff on Count 2 of plaintiff's amended complaint, and judgment is also entered in favor of PGA and against plaintiff Martin on count 3 of plaintiff's amended complaint alleging that plaintiff is an employee of the PGA and that the PGA discriminated against plaintiff because of his disability. The court enters a permanent injunction required PGA to provide plaintiff with automotive transportation in Nike Tour and PGA Tour competitions in which plaintiff is eligible. Automotive transportation shall be subject to the terms and conditions agreed upon by the parties. In the event the parties are unable to arrive at an agreement, the court shall retain juris-

DATE		PROCEEDINGS
		diction to resolve any dispute in this regard. Plaintiff may file an application for reasonable cost and attorney fees. There is no just reason for delay and entry of this judgment. SEE FORMAL JUDGMENT Signed 3/4/98 microfilmed 3/11/98 Judge Thomas M. Coffin (counsel notified) (ctw*)
3/17/98	92	AFFIDAVIT by Plaintiff Casey Martin of William Wiswall c-TC (lb)
3/17/98	93	AFFIDAVIT by Plaintiff Casey Martin o James K Walsh c-TC (lb)
3/17/98	94	AFFIDAVIT by Plaintiff Casey Martin of Karen Hendricks (lb)
3/17/98	95	CERTIFICATE OF SERVICE of affidavit [94-1], affidavit [93-1], affidavit [92-1] by Plaintiff Casey Martin (1b)
3/18/98	96	MOTION by Plaintiff Casey Martin FOR ATTORNEY FEES AND COSTS (sln*) [Entry date 03/19/98]
3/18/98	97	MOTION by Plaintiff Casey Martin FOR ATTORNEY FEES AND COSTS and memorandum in support of motion (sln*) [Entry date 03/19/98]
3/18/98	98	AFFIDAVIT by Plaintiff Casey Martin of Martha Lee Walters re: MOTION FOR ATTORNEY FEES AND COSTS [97-1] (sln*) [Entry date 03/19/98]

DATE		PROCEEDINGS
3/18/98	99	AFFIDAVIT by Plaintiff Casey Martin of William G. Wheatley re: MOTION FOR ATTORNEY FEES AND COSTS [97-1] (sln*) [Entry date 03/19/98]
3/18/98	100	COST BILL by Plaintiff Casey Martin [91-3] (sln*) [Entry date 03/19/98]
3/19/98	101	CERTIFICATE OF SERVICE of affidavit [99-1] by Plaintiff Casey Martin (lb) [Entry date 03/23/98]
3/20/98	102	NOTICE OF APPEAL to Court of Appeals by Defendant PGA Tour Inc of judgment and permanent injunction entered 3/4/98 Receipt # 168770 (lb) [Entry date 03/23/98]
3/23/98	—	NOTIFICATION OF APPEAL mailed to Court of Appeals For the Ninth Circuit and to counsel along with copy of appealed document and docket sheet. (lb)
3/30/98	103	NOTIFICATION by US Court of Appeals for the Ninth Circuit of Docket Number 98-35309 by Defendant regarding [102-1] (lb)
3/30/98	104	ORDER for time schedule. appeal [102-1] (Ib)
3/31/98	106	RESPONSE by Defendant PGA Tour Inc to [97-1] MOTION FOR ATTORNEY FEES AND COSTS, [96-1] MOTION FOR ATTORNEY FEES AND COSTS with request for oral argument (lb) [Entry date 04/02/98]
4/1/98	105	RECORD OF ORDER by Judge Thomas M. Coffin SETTING MOTION FOR ATTORNEY FEES AND COSTS [97-1] on

DATE		PROCEEDINGS
		oral argument calendar of 10:30 4/20/98, SETTING MOTION FOR ATTORNEY FEES AND COSTS [96-1] on oral argument calendar of 10:30 4/20/98 (counsel notified) (1b)
4/6/98	107	TRANSCRIPT DESIGNATION AND ORDERING FORM for date(s) 1/26/98; 2/2/98 appeal [102-1] (lb)
4/6/98	108	RECORD OF ORDER by Judge Thomas M. Coffin SETTING BILL OF COSTS MOTION [100-1] on oral argument calendar of 10:30 4/20/98 (counsel notified) (1b) [Entry date 04/07/98]
4/6/98	116	MOTION OF APPEAL to Court of Appeals by Plaintiff Casey Martin decision judgment [91-3] Receipt # 168833 (lb) [Entry date 04/09/98]
4/6/98	117	REPRESENTATION STATEMENT as to Casey Martin Attorneys Martha L Walters and William Wiswall represent plaintiff-appellee-cross appellant Attorneys William J Maledon Andrew D Hurwitz Scott W Rodgers and Thomas L Hudson represent defendant-appellant-cross-appellee (lb) [Entry date 04/09/98]
4/8/98	109	TRANSCRIPT of proceedings held 1/26/98 before Judge Thomas M. Coffin appeal [102-1] court reporter: Kristi Anderson (1b)

DATE		PROCEEDINGS
4/8/98	110	TRANSCRIPT of proceedings held 2/2/98 Vol 1 before Judge Thomas M. Coffin appeal [102-1] court reporter: Kristi Anderson (lb)
4/8/98	111	TRANSCRIPT of proceedings held 2/3/98 Vol 11 before Judge Thomas M. Coffin appeal [102-1] court reporter: Kristi Anderson/Sharon Gorham (1b)
4/8/98	112	TRANSCRIPT of proceedings held 2/4/98 Vol 3 before Judge Thomas M. Coffin appeal [102-1] court reporter: Kristi Anderson/Sharon Gorham (1b)
4/8/98	113	TRANSCRIPT of proceedings held 2/5/98 Vol 4 before Judge Thomas M. Coffin appeal [102-1] court reporter: Kristi Anderson/Sharon Gorham (lb)
4/8/98	114	TRANSCRIPT of proceedings held 2/10/98 Vol 5 before Judge Thomas M. Coffin appeal [102-1] court reporter: Kristi Anderson/Sharon Gorham (lb)
4/8/98	115	TRANSCRIPT of proceedings held 2/11/98 Vol 6 before Judge Thomas M. Coffin appeal [102-1] court reporter: Kristi Anderson/Sharon Gorham (lb)
4/9/98	—	NOTIFICATION OF APPEAL mailed to Court of Appeals For the Ninth Circuit and to counsel along with copy of appealed document and docket sheet. (lb)

DATE		PROCEEDINGS
4/14/98	118	MOTION by Plaintiff Casey Martin TO COMPEL PRODUCTION OF DOCUMENTS Oral Argument c-TC Requested (lb) [Entry date 04/16/98]
4/14/98	119	REPLY TO RESPONSE by Plaintiff Casey Martin re [97-1] MOTION FOR ATTORNEY FEES AND COSTS, [96-1] MOTION FOR ATTORNEY FEES AND COSTS (lb) [Entry date 04/16/98]
4/14/98	120	AFFIDAVIT by Plaintiff Casey Martin of Martha L Walters re: MOTION reply [119-1] (lb) [Entry date 04/16/98]
4/15/98	121	RECORD OF ORDER by Judge Thomas M. Coffin SETTING MOTION TO COMPEL PRODUCTION OF DOCUMENTS [118-1] Telephone argument set for 9:00 4/16/98 (counsel notified) (lb) [Entry date 04/16/98]
4/16/98	122	RECORD OF PROCEEDINGS before Judge Thomas M. Coffin GRANTING IN PART AND DENYING IN PART MOTION TO COMPEL PRODUCTION OF DOCUMENTS [118-1] (counsel notified) (lb) [Entry date 04/17/98]
4/17/98	123	AFFIDAVIT by Plaintiff Casey Martin of William Wiswall re: MOTION FOR ATTORNEY FEES AND COSTS [97-1] (lb)
4/17/98	124	RESPONSE by Plaintiff Casey Martin to [96-1] MOTION FOR ATTORNEY FEES AND COSTS (lb)

DATE		PROCEEDINGS
4/17/98	125	CERTIFICATE OF SERVICE of response [124-1] , affidavit [123-1] by Plaintiff Casey Martin (lb)
4/17/98	126	REPLY by Defendant PGA Tour Inc to plaintiff's motion to compel documents (lb) [Entry date 04/21/98]
4/20/98	127	RECORD OF PROCEEDINGS before Judge Thomas M. Coffin TAKING UNDER ADVISEMENT on 4/20/98 cost MOTION [100-1], TAKING UNDER ADVISEMENT on 4/20/98 MOTION FOR ATTORNEY FEES AND COSTS [97-1], TAKING UNDER ADVISEMENT on 4/20/98 MOTION FOR ATTORNEY FEES AND COSTS [96-1] (counsel notified) Court Rptr Kristi Anderson (lb) [Entry date 04/21/98]
4/20/98	128	SUPPLEMENTAL AFFIDAVIT by Plaintiff Casey Martin of Martha Lee Walters re: MOTION FOR ATTORNEY FEES AND COSTS , [97-1], MOTION FOR ATTORNEY FEES AND COSTS [96-1] (1b) [Entry date 04/21/98]
4/21/98	129	NOTIFICATION by US Court of Appeals for the Ninth Circuit of Docket Number 98-35367 by Plaintiff regarding [116-1] (lb)
4/21/98	130	ORDER for time schedule. appeal [116-1] (lb)
4/23/98	131	ORDER by Judge Thomas M. Coffin GRANTING cost MOTION [100-1] in the amount of $16,881.93, GRANTING MOTION FOR ATTORNEY FEES AND

DATE		PROCEEDINGS
		COSTS [97-1], GRANTING MOTION FOR ATTORNEY FEES AND COSTS [96-1] in the amount of $105,020 for Wiswall's firm; $105,016.50 for Walter's firm. Signed 4/23/98 (counsel notified) (ctw*) [Entry date 04/24/98]
5/13/98	132	MOTION by Defendant PGA Tour Inc TO STAY EXECUTION OF ATTORNEY'S FEE AWARD Oral Argument Requested (lb) [Entry date 05/19/98]
5/13/98	133	NOTICE OF APPEAL to Court of Appeals by Defendant PGA Tour Inc 4/24/98 order awarding attorney fees Receipt # 900141 (lb) [Entry date 05/19/98]
5/19/98	—	NOTIFICATION OF APPEAL mailed to Court of Appeals For the Ninth Circuit and to counsel along with copy of appealed document and docket sheet. (lb)
5/21/98	134	RECORD OF ORDER by Judge Thomas M. Coffin SETTING MOTION TO STAY EXECUTION OF ATTORNEY'S FEE AWARD [132-1] on oral argument calendar of 10:00 6/3/98 (counsel notified) (1b) [Entry date 05/22/98]
5/26/98	135	REPLY by Plaintiff Casey Martin re MOTION TO STAY EXECUTION OF ATTORNEY'S FEE AWARD [132-1] (lb) [Entry date 05/27/98]
5/26/98	136	AFFIDAVIT by Plaintiff Casey Martin of Martha Lee Walters re: reply [135-1] (lb) [Entry date 05/27/98]

DATE		PROCEEDINGS
5/26/98	137	NOTIFICATION by US Court of Appeals for the Ninth Circuit of Docket Number 98-35509 by Defendant regarding [133-1] (lb) [Entry date 05/28/98]
5/26/98	138	ORDER for time schedule appeal [133-1] (lb) [Entry date 05/28/98]
5/27/98	139	NOTICE OF CROSS APPEAL to Court of Appeals by Plaintiff Casey Martin of notice of appeal filed 5/13/98 (#132) Receipt # 900179 (lb) [Entry date 05/28/98]
5/28/98	140	RECORD OF ORDER by Judge Thomas M. Coffin SETTING MOTION TO STAY EXECUTION OF ATTORNEY'S FEE AWARD [132-1] on oral argument calendar of 10:30 6/3/98 (counsel notified) (lb)
6/1/98	141	REPLY TO RESPONSE by Defendant PGA Tour Inc re MOTION TO STAY EXECUTION OF ATTORNEY'S FEE AWARD [132-1] (lb) [Entry date 06/02/98]
6/2/98	142	SUPPLEMENTAL REPLY by Plaintiff Casey Martin re MOTION TO STAY EXECUTION OF ATTORNEY'S FEE AWARD [132-1] (lb)
6/3/98	143	SUPPLEMENTAL AFFIDAVIT by Plaintiff Casey Martin of William Wiswall re: MOTION TO STAY EXECUTION OF ATTORNEY'S FEE AWARD [132-1] (1b)
6/3/98	144	RECORD OF PROCEEDINGS before Judge Thomas M. Coffin TAKING UNDER ADVISEMENT on 6/3/98 MOTION TO STAY EXECUTION OF ATTORNEY'S

DATE		PROCEEDINGS
		FEE AWARD [132-1] (counsel notified) Court Rptr Amanda Essner (lb)
6/4/98	145	SUBSTITUTION of Attorney Susan E Watts replacing attorney Garr M King for US Golf Association (lb)
6/8/98	146	NOTIFICATION by US Court of Appeals for the Ninth Circuit of Docket Number 98-35547 by Plaintiff regarding [139-1] (lb)
6/8/98	147	ORDER for time schedule. appeal [139-1] (lb)
6/15/98	148	ORDER by Judge Thomas M. Coffin GRANTING MOTION TO STAY EXECUTION OF ATTORNEY'S FEE AWARD [132-1] The stay shall take effect upon the posting of the supersedeas bond Signed 6/15/98 (counsel notified) (lb)
6/17/98	149	TRANSCRIPT DESIGNATION AND ORDERING FORM for date(s) 4/2/09 appeal [133-1] (lb) [Entry date 06/18/98]
6/18/98	150	TRANSCRIPT of proceedings held 4/20/98 before Judge Thomas M. Coffin appeal [133-1] court reporter; Kristi Anderson (lb) [Entry date 06/19/98]
6/22/98	151	BOND supersedeas undertaking filed by defendant re: PGA Tour Inc () (lb)
6/25/98	152	MANDATE/JUDGMENT from USCA re: Appeal #98-35367 [116-1] ; Pursuant to the court's 6/3/98, order, this appeal is deemed DISMISSED VOLUNTARILY. Dismissal is without prejudice to plaintiff's pursuing

DATE		PROCEEDINGS
		alternative grounds for affirmance in his brief in defendant's appeal. (lb) [Entry date 06/26/98]
8/14/98	153	CERTIFICATE OF RECORD transmitted to US Court of Appeals for the Ninth Circuit [139-1] (lb)
8/14/98	154	CERTIFICATE OF RECORD transmitted to US Court of Appeals for the Ninth Circuit [133-1] (lb)
10/20/98	155	CERTIFIED COPY OF ORDER from the US Court of Appeals for the Ninth Circuit [133-1], [116-1] , [102-1] (lb)
10/26/98	156	CERTIFIED COPY OF ORDER from the US Court of Appeals for the Ninth Circuit as to 98-35509 (#133) and 98-35547 (#139) Remainder of briefing schedule is vacated Defendant's optional reply brief in appeal 98-35509 (#133) is due 14 days from date of this order (lb)
11/2/98	157	MANDATE/JUDGMENT from USCA VOLUNTARILY DISMISSING the appeal [139-1] (lb)
3/30/00	158	MANDATE/JUDGMENT from USCA AFFIRMING the decision of the District Court [133-1] , AFFIRMING the decision of the District Court [102-1] (lb) [Entry date 03/31/00]

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

Nos. 98-35309, 98-35509.

CASEY MARTIN,
Plaintiff-Appellee,
v.
PGA TOUR INC., a Maryland corporation,
Defendant-Appellant.

Argued and Submitted May 4, 1999.
Decided March 6, 2000

Before: CANBY and T.G. NELSON, *Circuit Judges*, and FOGEL,[1] *District Judge*.

CANBY, *Circuit Judge*:

PGA Tour, Inc. ("PGA") appeals from the district court's decision in favor of Casey Martin, a disabled professional golfer, ordering PGA to make an exception to its "walking rule" to allow Martin to ride a golf cart during PGA competitions. We conclude that the Americans with Disabilities Act ("ADA") applies to PGA competitions and that allowing Martin to use a cart is a reasonable accommodation that does not fundamentally alter the nature of those events. We therefore affirm the district court's decision.

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[1] The Honorable Jeremy Fogel, United States District Judge for the Northern District of California, sitting by designation.

BACKGROUND

Casey Martin suffers from Klippel-Trenaunay-Weber Syndrome, a congenital, degenerative circulatory disorder that is manifested in a malformation of his right leg. This disorder causes Martin severe pain and atrophy in his lower leg, rendering him unable to walk for extended periods of time. The mere act of walking subjects him to a significant risk of fracture or hemorrhaging. There is no dispute that Martin is profoundly disabled.

PGA is a non-profit association of professional golfers.[2] It sponsors three competitive tours: (1) the PGA Tour, its most competitive tour, (2) the Nike Tour, one step down from the PGA Tour, and (3) the Senior PGA Tour, restricted to professional golfers age 50 and over. On days of tour competition, PGA is the operator of the golf course.[3]

The primary means of gaining entry to the PGA Tour and Nike Tour is by a competition known as the qualifying school. The best scorers in that competition qualify for the PGA Tour, and the next-best finishers qualify for the Nike Tour. Players in the Nike Tour may qualify for the PGA Tour by winning three Nike Tour tournaments in one year or by being in the top fifteen money- winners in the Nike Tour.

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[2] We refer hereafter to the defendant PGA Tour, Inc. as "PGA," in order to differentiate it from the PGA Tour, which is one of the three tours sponsored by PGA Tour, Inc.

[3] The term "operates," as it is used in the ADA, is extensive and "would include sublessees, management companies, and any other entity that owns, leases, leases to, or operates a place of public accommodation, even if the operation is only for a short time." 28 C.F.R. ch. I, pt. 36, app. B., at 628 (1999).

The qualifying school competition is conducted in three stages. In the first two stages, players are permitted to use golf carts. In the third stage, and in the PGA and Nike Tours themselves, players are required to walk as they play the course.[4] After qualifying for the third and final stage of the 1997 qualifying school, Martin requested permission from PGA to use a golf cart. PGA denied this request, and Martin sued.

The district court granted Martin a preliminary injunction and, using a golf cart, he performed well enough in the final stage of the qualifying school to earn a spot on the 1998 Nike Tour. The court subsequently granted Martin partial summary judgment, holding that PGA is subject to Title III of the ADA because it owns, operates and leases golf courses, which the ADA identifies as places of public accommodation.[5] *Martin v. PGA Tour, Inc.*, 984 F.Supp. 1320 (D.Or.1998). After a six-day bench trial, the district court concluded that modifying the walking rule for Martin was a reasonable accommodation that did not fundamentally alter the nature of PGA golf tournaments. *Martin v. PGA Tour, Inc.*, 994 F.Supp. 1242 (D.Or.1998). It accordingly entered a permanent injunction requiring PGA to permit Martin to use a golf cart in PGA and Nike Tour competitions in which he is eligible to participate, and in any qualifying rounds for those tours. PGA appeals.[6]

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[4] Players are permitted to use golf carts on the Senior Tour.

[5] The district court also ruled that PGA is not exempt from the ADA as a "private club," *see* 42 U.S.C. § 12187, because, among other reasons, it is a commercial enterprise offering athletic events to the public. *Martin*, 984 F.Supp. at 1326. PGA has not challenged that ruling on this appeal.

[6] The district court awarded Martin attorneys' fees and costs. PGA has protectively appealed that order; it does not contest the amount but seeks reversal of the award if it succeeds on appeal. Because we affirm on the merits, we also affirm the award of fees and costs to Martin as the prevailing party.

DISCUSSION

I. *Applicability of Title III (Public Accommodation)*

The district court granted Martin's motion for summary judgment, holding that, as a matter of law, Title III of the ADA applies to the PGA and Nike Tour competitions. We review de novo the district court's interpretation of the ADA. *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1246 (9th Cir.1999).

We begin our analysis, as did the district court, with the terms of the statute. The basic anti-discrimination clause of Title III of the ADA provides:

> No individual shall be discriminated against on the basis of disability in the full enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). The first issue for decision is whether Martin seeks to enjoy the facilities of a "place of public accommodation." The definition section of Title III of the ADA provides:

> The following private entities are considered public accommodations for purposes of this subchapter . . .
>
> * * * * *
>
> (L) a gymnasium, health spa, bowling alley, *golf course*, or other place of exercise or recreation.

42 U.S.C. § 12181(7)(L) (emphasis added). There is nothing ambiguous about this provision; golf courses are public accommodations. Indeed, PGA does not dispute that during one of its tournaments a golf course is a public accommodation with regard to the spectator areas; its contention is that the competitors' area "behind the ropes" is not a public accommodation because the public has no right

to enter it. Despite the surface plausibility of this argument, it too narrowly construes the nature of a public accommodation.

The district court held that a public accommodation could not be compartmentalized in the fashion PGA desired. At least in the present context, we agree. It is true that the general public cannot enter the area "inside the ropes," but competitors, caddies, and certain other personnel can. PGA contends that the restricted area is not being used as a "place of exercise or recreation," within the meaning of § 12181(7)(L), because the competitors are trying to win money, not exercise or recreate. Even if we were to agree with this point, it would not aid PGA. The statute also defines "public accommodation" to include a "theater, . . . stadium or other place of exhibition or entertainment." 42 U.S.C. § 12181(7)(C). If a golf course during a tournament is not a place of exercise or recreation, then it is a place of exhibition or entertainment. The statute does not restrict this definition to those portions of the place of exhibition that are open to the general public. The fact that entry to a part of a public accommodation may be limited does not deprive the facility of its character as a public accommodation. *See Independent Living Resources v. Oregon Arena Corp.*, 982 F.Supp. 698, 759 (D.Or.1997) (arena's executive suites contracted by businesses are public accommodations). Indeed, the underlying premise of the cases dealing with disabled student athletes is that Title III applies to the playing field, not just the stands. *See, e.g., Bowers v. National Collegiate Athletic Ass'n*, 9 F.Supp.2d 460, 483-90 (D.N.J.1998); *Tatum v. National Collegiate Athletic Ass'n*, 992 F.Supp. 1114, 1121 (E.D.Mo.1998); *Ganden v. National Collegiate Athletic Ass'n*, 1996 WL 680000, at *8-11 (N.D.Ill. Nov.21, 1996); *see also Anderson v. Little League Baseball, Inc.*, 794 F.Supp. 342, 344 (D.Ariz.1992) (undisputed that Title III applies to access to coaches' box on baseball field).

The Third Circuit dealt with a somewhat analogous problem in *Menkowitz v. Pottstown Memorial Medical Center*, 154 F.3d 113 (3d Cir.1998). There a physician with a disability sued a hospital under Title III after it denied him hospital staff privileges. The Third Circuit rejected the argument that Title III could be invoked only by the patients of a hospital, and held that denial of staff privileges qualified as a denial of "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation" prohibited by Title III, § 12182(a). *Id.* at 122. Staff privileges, of course, entail access to parts of the facility to which patients and the general public are denied entry.

In contending that it may compartmentalize golf courses during tournaments, PGA leans heavily on two examples set forth in the regulations. One is of a "mixed use facility," in the form of a large hotel that has a separate residential wing. *See* 28 C.F.R. ch. I, pt. 36, app. B, at 623 (1999). The non-public residential wing (which would be covered by the Fair Housing Act) is not a place of "public accommodation." *See id.* The hotel wing, however, would fall under 42 U.S.C. § 12181(7)(A) as an "inn, hotel, motel, or other place of lodging." 28 C.F.R. ch I, pt. 36, app. B, at 623; *see* 42 U.S.C. § 12181(7)(A). But in this example, the residential wing has never functioned as a hotel. A golf course during a tournament, however, is serving as a golf course.

The other example cited by PGA is that of a commercial facility, such as a factory, that allows public tours over specific routes at particular times. *See* 28 C.F.R. ch. I, pt. 36, app. B, at 624. The tour route is a public accommodation but the portions of the facility merely viewed from that route are not. *See id.* There are two reasons why this example is not persuasive. First, it applies to commercial facilities "not otherwise a place of public accommodation." *Id.* Second, the example would be analogous only if Martin were a spectator

seeking to use his golf cart within the competitors' area of a tournament.

This point brings us to the greatest difficulty with PGA's argument. It assumes that there is nothing public about the competition itself. According to PGA, the fact that its tournaments are restricted to the nation's best golfers means that the courses on which they play during tournaments cannot be places of public accommodation. But the fact that users of a facility are highly selected does not mean that the facility cannot be a public accommodation. For example, Title III includes in its definition "secondary, undergraduate, or postgraduate private school[s]." 42 U.S.C. § 12181(7)(J). The competition to enter the most elite private universities is intense, and a relatively select few are admitted. That fact clearly does not remove the universities from the statute's definition as places of public accommodation. It is true that the rest of the public is then excluded from the schools, but the students who are admitted are nevertheless members of the public using the universities as places of public accommodation.[7]

Competition to enter the select circle of PGA and Nike Tour golfers is comparable. Any member of the public who pays a $3000 entry fee and supplies two letters of recommendation may try out in the qualifying school. At the initial stage, it seems plain that the golf course on which the elimination begins is a place of public accommodation. As even PGA admits, "[t]he competition areas of some amateur

[7] Title III does not restrict its coverage to members of the public; it provides that "No individual shall be discriminated against" in the enjoyment of public accommodations by reason of disability. 42 U.S.C. § 12182(a) (emphasis added). This provision does not, however, grant access to a place where the individual is not entitled to be; the rejected applicant for admission is not entitled to access to the university, and the spectator is not entitled to access to the tees, fairways and greens during a PGA golf tournament.

sporting events may well constitute places of public accommodation under Title III of the ADA when virtually any member of the public can participate." We fail to see, however, why a winnowing process would change the nature of the facility. If a stadium owner invited the public to compete in long distance races, and continued to run heats until only the ten best runners remained, the track would be no less a place of public accommodation when the final race was run. We see no justification in reason or in the statute to draw a line beyond which the performance of athletes becomes so excellent that a competition restricted to their level deprives its situs of the character of a public accommodation. Nor do we see any such justification for drawing a line between use of a place of public accommodation for pleasure and use in the pursuit of a living.

We conclude, therefore, that golf courses remain places of public accommodations while a PGA tournament is being conducted on them.

II. *Reasonable Modification (Accommodation)*

Title III further defines "discrimination" to include:

> a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications *would fundamentally alter the nature* of such goods, services, facilities, privileges, advantages or accommodations.

42 U.S.C. § 12182(b)(2)(A)(ii) (emphasis added).

Here, it is clear that permitting Martin to use a golf-cart is "reasonable" in the sense that it solves the problem of Martin's access to the competition. It is also "reasonable," as the district court found, in that golf-carts are used in other

competitions (such as those on the Senior Tour), and it is not a difficult practical matter to permit them. Use of a golf cart is also "necessary"; there was ample evidence to support the district court's finding that Martin could not walk the course, even with artificial aids. These matters are no longer in serious contention.

The issue on which most of the dispute centers is whether permitting Martin to use a golf cart will "fundamentally alter" the nature of the goods or service—the PGA or Nike Tour. It is readily apparent that walking is not essential to the generalized game of golf. Rule 1-1 of the Rules of Golf, promulgated by the United States Golf Association and the Royal and Ancient Golf Club of St. Andrews, Scotland, states:

> The Game of Golf consists in playing a ball from the teeing ground into the hole by a stroke or successive strokes in accordance with the Rules.

These Rules do not require players to walk. Indeed, PGA does not require players to walk in the early stages of the qualifying school or in the Senior Tour.

PGA correctly points out, however, that it is not offering the generalized game of golf in its PGA and Nike Tours, it is offering a particular competition. PGA provides, in the Conditions of Competition for its PGA and Nike Tours, that "[p]layers shall walk at all times during a stipulated round unless permitted to ride by the PGA TOUR Rules Committee." On occasions when the Committee has permitted players to ride, the waiver applies to all competitors, as when all players must be shuttled from the 9th green to the 10th tee when the distance is great. It also appears that, to save time, rides have been given from the fairway back to the tee to players who have lost a ball and must tee off again.

The issue for decision, then, is whether the accommodation of permitting Martin to use a golf cart fundamentally alters the PGA and Nike Tour competitions. That issue was fully tried in the district court.

The district court found that the purpose of requiring players to walk was to inject a fatigue factor into the shot-making of the game. *Martin*, 994 F.Supp. at 1250. It also found, however, that "the fatigue factor injected into the game of golf by walking the course cannot be deemed significant under normal circumstances." *Id.* It further found that, at the low levels of intensity of exercise involved in untimed walking of a golf course during a competition, "fatigue . . . is primarily a psychological phenomenon. . . . Stress and motivation are the key ingredients here." *Id.* at 1251. The court noted that, given the choice of carts or walking in other tours, large numbers of players chose to walk. *See id.* In the events in which PGA permits carts, it assigns no handicap penalty to those who ride as opposed to those who walk. *See id.* at 1248.

There was ample evidence to support all of these findings, and they are not clearly erroneous. Against this background, the district court evaluated whether use of a cart would give Martin an advantage over the other players who were required to walk. Even with a cart, Martin must walk about twenty-five percent of the course because the cart cannot be brought near to the ball in many cases. Martin endures significant pain while walking, and while getting in and out of his cart. The district court, after considering these factors, found that Martin "easily endures greater fatigue even with a cart than his able-bodied competitors do by walking." *Id.* at 1252.

In light of these findings, we conclude, as did the district court, that permitting Martin to use a golf court in PGA and Nike Tour competitions would not fundamentally alter the nature of those competitions. The central competition in

shot-making would be unaffected by Martin's accommodation. All that the cart does is permit Martin access to a type of competition in which he otherwise could not engage because of his disability.[8] That is precisely the purpose of the ADA. *See* 42 U.S.C. § 12101(a)(5) (discrimination against disabled includes "failure to make modifications to existing facilities and practices"); *Crowder v. Kitagawa*, 81 F.3d 1480, 1483 (9th Cir.1996) (Congress intended ADA to cover discriminatory impact of facially neutral barriers).

PGA argues that the kind of balancing engaged in by the district court and now by this court is wholly illegitimate. It agrees that some athletic rules, such as dress codes or uniform requirements, may be subject to exceptions to accommodate the disabled. But it contends that a rule intended to affect the competition cannot be made subject to exception. According to PGA, the case should have ended in its favor the moment the district court concluded that the purpose of PGA's walking-only rule was to inject the fatigue factor into the competition. Once that rule is determined to be "substantive," according to PGA, it is not subject to exceptions to accommodate disability.

The difficulty with this position is that it reads the word "fundamentally" out of the statutory language, which requires reasonable accommodation unless PGA can demonstrate that the accommodation would "fundamentally alter the nature" of its competition. 42 U.S.C. § 12182(b)(2)(A)(ii). PGA essentially argues that permitting a player to ride alters the competition and inquiry must stop there. It makes all alterations of the competition fundamental. But the statute

[8] We note that the NCAA and Pac-10 rules of competition require players to walk and carry their own clubs. Martin applied for, and was granted, a waiver of that rule that permitted him to compete in college tournaments when he was a student.

mandates an inquiry into whether a particular exception to a rule would "fundamentally alter" the nature of the good or service being offered. The issue here is not whether use of carts generally would fundamentally alter the competition, but whether the use of a cart by Martin would do so. The evidence must "focus [ ] on the specifics of the plaintiff's or defendant's circumstances and not on the general nature of the accommodation." *Johnson v. Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1060 (5th Cir.1997). We cannot tell whether a golf cart for Martin fundamentally alters the competition without first investigating whether walking is fundamental to the competition. The mere fact that PGA has defined walking to be part of the competition cannot preclude inquiry, or PGA will have been able to define itself out of reach of the ADA. The district court, as we have said, found that the fatigue factor injected into the game by walking was not significant, and that finding was not clearly erroneous.

The nature of the district court's findings reflect the fact that whether an accommodation fundamentally alters a competition is an intensively fact-based inquiry. For that reason, we reject PGA's argument that permitting Martin to use a golf cart would open the door to future decisions requiring that disabled swimmers or runners be given a head start in a race, or that a growth-impaired basketball player be allowed to shoot 3-point baskets from inside the three-point line. We have little doubt that fact-based inquiries into the effects of such accommodations would result in rulings that those accommodations fundamentally altered the competitions. The same would be true if Martin were seeking to use a special golf ball that carried farther than others, or was seeking to play a shorter course than his competitors. Martin, however, seeks only to use a cart between shots, and the district court, after considering the evidence presented in a full trial, found that this accommodation does not fundamentally alter the competition.

PGA next contends that it was wholly improper for the district court to consider whether Martin's condition was such that riding would not give him an unfair advantage over competitors who walked. PGA has steadfastly declined to consider Martin's condition in adhering to its position that permitting him to use a cart would fundamentally change its competition. It contends that it would be far too burdensome for PGA to determine whether disabled individuals using carts would have an advantage over non-disabled walking competitors. PGA relies on *Sandison v. Michigan High Sch. Athletic Ass'n*, 64 F.3d 1026 (6th Cir.1995), which upheld an upper-age limit for high school athletes. *Sandison* rejected an argument that over-age would not provide a competitive advantage for the learning-disabled plaintiffs because they were of only average athletic ability; it stated that "[i]t is plainly an undue burden to require high school coaches and hired physicians to determine whether [various] factors render a student's age an unfair competitive advantage." *Id.* at 1035; *see also McPherson v. Michigan High Sch. Athletic Ass'n*, 119 F.3d 453, 462 (6th Cir.1997) (upholding maximum eight-semester eligibility rule on same grounds); *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 931 (8th Cir.1994) (same).

The foundation of these cases, however, was a finding, or evidence compelling a finding, that the rule against older or more experienced high- school athletes was necessary to protect the competition in the lower age group, and to prevent "red-shirting" of athletes to permit them to compete when older and more experienced than the others. *See Sandison*, 64 F.3d at 1035; *McPherson*, 119 F.3d at 462; *Pottgen*, 40 F.3d at 931 & n. 6. The record in this case is quite different; the district court found that the fatigue factor introduced by walking was not significant.[9]

[9] This finding also distinguishes Martin's case from *Olinger v. United States Golf Ass'n*, 55 F.Supp.2d 926 (N.D.Ind.1999), in which the district court found on the evidence there presented that use of a cart can provide a golfer with a competitive advantage over a golfer who walks. *See id.* at 935. To the extent that other rulings in *Olinger* are inconsistent with our decision today, we respectfully disagree with it.

Moreover, we do not share the antagonism to individual determinations reflected in these cases. "We prefer the approach of Judge Richard Arnold, dissenting in *Pottgen*, that the inquiry must focus on the individual exception and that, in light of the plaintiff's individual characteristics as found by the district court, the age requirement could be modified for this individual player without doing violence to the admittedly salutary purposes underlying the age rule." *Pottgen*, 40 F.3d at 932 (dissenting opinion). The Seventh Circuit adopted such an approach in *Washington v. Indiana High Sch. Athletic Ass'n*, 181 F.3d 840 (7th Cir.), *cert. denied*, — U.S. —, 120 S.Ct. 579, 145 L.Ed.2d 482 (1999), in enjoining enforcement of an eight- semester rule against a learning-disabled student. It observed that applying the eight-semester rule to exclude the particular plaintiff would not "add anything to the protections provided by the IHSAA's age limit rule, which generally limits the size, strength and athletic maturity of student athletes." *Id.* at 852. The court continued:

> Nor will the record support the argument that a waiver of the rule in Mr. Washington's case would place an undue administrative or financial burden on the IHSAA. The record indicates that Mr. Washington is the only student athlete to seek a waiver because of a learning disability in more than a decade. The few case-by-case analyses that the IHSAA would need to conduct hardly can be described as an excessive burden.

Id. Much the same can be said here. Nothing in the record establishes that an individualized determination would impose an intolerable burden on PGA. Although PGA refused

to consider the effect of Martin's disability, the district court appeared to have little difficulty making the factual determination that providing Martin with a golf cart would not give him an unfair advantage over his competitors. We conclude that, under the ADA, that determination was a proper one for the court to make. *See Johnson*, 116 F.3d at 1059-60 (fundamental alteration defense focuses on individual circumstances).

CONCLUSION

We conclude that, under Title III of the ADA, a golf course is a place of public accommodation while PGA is conducting a tournament there. We also conclude that the district court did not err in determining that the provision of a golf cart to Martin was a reasonable accommodation to his disability, and that use of the cart by Martin did not fundamentally alter the nature of the PGA and Nike Tour tournaments. We accordingly affirm the judgment of the district court.[10]

AFFIRMED.

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[10] Our ruling that Martin is entitled to relief under § 12182(a) of Title III makes it unnecessary to address his alternative arguments.

UNITED STATES DISTRICT COURT,
D. OREGON.

No. 97-6309-TC.

CASEY MARTIN,
Plaintiff,

v.

PGA TOUR, INC., a Maryland Corporation,
Defendant.

Feb. 19, 1998

FINDINGS OF FACT AND CONCLUSIONS OF LAW

COFFIN, United States Magistrate Judge.

This case presents profound questions regarding the application of the Americans with Disabilities Act (ADA). Does the ADA apply to athletic events or sports organizations? If so, are the most elite events and organizations, such as those at the professional level, somehow exempt from coverage? If the ADA is applicable, may a rule of competition be modified to accommodate a disabled competitor, or are the rules untouchable because any alteration of any rule would fundamentally alter the nature of the competitions?

Casey Martin is a disabled professional golfer. He can do everything well in the game of golf except walk to and from his shots. Because of a congenital deformity, his right leg is severely atrophied and weakened. He is placed at significant risk of fracturing his tibia by the simple act of walking, because of the increasing loss of bone stock and weakening of this bone that has occurred over the lifetime of this disorder. According to the medical testimony, walking also places

Martin at significant risk of hemorrhaging as well, and creates an increased chance of developing deep venous thrombosis (blood clots).

The condition plaintiff suffers from causes him severe pain and discomfort. The slightest touching of his right leg at or below the knee is extremely painful. Beyond this, the condition causes him pain while playing golf, pain while carrying on daily activities and pain even while he is at rest.

A video of plaintiff's condition introduced into evidence at the trial, provides compelling evidence of the nature and extent of his disability[11]: The right leg appears to be about half the size of plaintiff's left leg. When plaintiff removes his double set of support stockings and stands upright, the leg immediately discolors and swells in size because the circulatory condition with which he is afflicted prevents the blood from flowing through his veins back to the heart. Instead, gravity, combined with "incompetent" valves which fail to close properly, pulls the blood back down his leg. The leg becomes engorged in blood because the arteries pump blood to his leg but the veins fail to circulate blood back to the heart. To relieve this situation, plaintiff must lie down and elevate the leg.

A double set of support or compression stockings provides plaintiff with enough venous pressure to allow him to remain

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[11] Defendant PGA Tour objected to the introduction of the video on grounds of relevance and hearsay. The objection as to relevance was based on the PGA's position that it conceded Martin has a disability and this evidence on that issue was unnecessary. However, as I will explain more fully *infra*, I disagree with the PGA's contention that an individualized assessment of Casey Martin's disability is irrelevant to the outcome of this case. Consideration of the nature and extent of plaintiff's disability is critical to determining whether use of a cart affords him a reasonable accommodation under the circumstances presented. The hearsay objection concerned certain audio portions of the tape, which portions were stricken from the record.

upright for periods of time. As he has gotten older (he is now 25 years of age), his leg has steadily worsened because of his disability. Whereas he used to be able to walk a golf course (albeit with difficulty), he can no longer do so. As noted, he is at substantial risk of serious physical harm by the mere act of walking.

Dr. Donald Jones, plaintiff's treating physician, counsels that it is medically necessary for Casey Martin to be permitted a cart it [sic] he is to play the game of golf. As he summarized plaintiff's condition:

> [T]he medical records reflect a 25-year old male with a rare congenital vascular malformation of the right lower extremity which has led to, number one, chronic pain secondary to vascular engorgement and progressive loss of bone stock, pain so severe that he has at least considered to explore the use of time contingent narcotics; number two, a documented sleep disorder secondary to chronic pain which leads, according to Dr. Holmes, to an exhaustion syndrome; number three, the need to wear two compression stockings at all times; number four, it has resulted in marked muscular atrophy and weakness in his right calf; number five, it has affected his knee through multiple intra-articular bleeds, causing abnormalities which are painful; and number six, and most important from the orthopedic aspect, it has resulted in a weakened tibia which is at risk for fracture and potential limb loss and/or serious post-fracture complications.

Transcript (#) at pp. 99-100.

Defendant PGA Tour does not contest that plaintiff has a disability within the meaning of the ADA, nor does it contest that his disability prevents him from walking the course during a round of golf. However, prior to this trial, defendant did not review plaintiff's medical records nor view the

videotaped presentation of his condition. The PGA's position in this case has been twofold:

First, it asserts that the ADA does not apply to its professional golf tournaments; and

Second, the PGA asserts that the requirement of walking is a substantive rule of its competition and that a waiver of the rule would, accordingly, result in a fundamental alteration of its competitions, which the ADA does not require.

The first defense raised by the PGA—that the ADA is inapplicable to its tournaments—has been extensively discussed in this court's order dated January 30, 1998(# 69), wherein I found that the PGA Tour was not exempt, as a "private club," from ADA coverage and also found that its tournaments were conducted at places—i.e., golf courses—that were specifically included within the definition of places of "public accommodation" subject to the ADA.

The second defense encompasses the concept that the ADA does not require a covered entity to work a fundamental alteration of the nature of its business or programs in order to accommodate the disabled, nor need the entity accommodate if to do so would result in an undue hardship to the entity.

A few examples suffice to illustrate this point: Suppose a bookstore normally does not stock books in braille. A blind customer demands the accommodation of a supply of such books. The bookstore need not comply with the request, as such an accommodation would fundamentally alter the nature of its business. *See* 28 C.F.R. Ch. 1 Pt. 36, App. B at p. 632 (July 1, 1997 edition).[12] Or, to use another example cited by

[12] If the disabled person were an employee of the bookstore, however, and required a braille-encoded computer to perform her tasks, a different analysis would be applied and the question would be whether the accommodation would be an undue hardship (e.g., too great a financial burden) on the employer. *See* 42 U.S.C. §§ 12112(b)(5)(A), 12111(10). Because I find that Casey Martin is not an employee of the PGA Tour

the PGA, a day care center normally does not provide individualized care (*i.e.*, one attendant for each child) to its customers. A disabled child, in need of individualized attention, requests such an accommodation. The day care center need not comply because such would fundamentally alter the nature of the service the center provides.

There are few reported cases wherein the ADA has been applied to sports programs:

The Sixth Circuit Court of Appeals applied the ADA to the Michigan High School Athletic Association on two separate occasions regarding eligibility requirements. In *McPherson v. MHSAA*, 119 F.3d 453 (6th Cir.1997) the court considered whether the MHSAA's eight semester rule[13] violated the ADA when applied to a student with a learning disability which prevented him from completing high school in eight semesters. The court initially noted that the simple fact that the MHSAA labeled the rule necessary did not make it so, but that the court had an independent responsibility to determine whether the rule is in fact necessary. *Id.* at 461. The court determined the rule was necessary.[14] The court then found that requiring the MHSAA to waive the rule would work a fundamental alteration in its sports programs and would impose an immense financial and administrative burden on

(infra), I focus only on the issue of whether he is entitled to his requested accommodation (the use of a golf cart) as an independent contractor playing in defendant's tournaments which are held at places of public accommodation.

[13] The MHSAA's eight semester rule provided that any student who has completed eight semesters of high school is ineligible for interscholastic sports competition.

[14] The purpose of the rule was to limit the level of athletic experience and range of skills of the players in order to create a more even playing field for the competitors, to limit the size and physical maturity of high school athletes for the safety of all participants, and to afford the players who observe the rule a fair opportunity to compete for playing time.

the MHSAA by forcing it to make "near impossible determinations" about a particular student's physical and athletic maturity.

Two years prior the court similarly found that waiver of an age regulation in high school sports fundamentally altered the program. *See Sandison v. MHSAA*, 64 F.3d 1026 (6th Cir.1995). The court noted, as it did in *McPherson*, that individually determining whether each older student possessed an unfair competitive advantage was not a reasonable accommodation. *Id.* at 1037.

The Eighth Circuit was confronted with a similar age eligibility rule of the Missouri State High School Athletic Association. *See Pottgen v. MSHSAA*, 40 F.3d 926 (8th Cir.1994). In *Pottgen* the court found that the age requirement was essential to the high school athletic program and that an individualized inquiry into the necessity of the requirement in the plaintiff's case was inappropriate. *Id.* at 930.[15]

The District Court for the District of New Jersey found that complete abandonment of the "core course" requirement would fundamentally alter the nature of NCAA athletic programs. *Bowers v. National Collegiate Athletic Assoc.*, 974 F.Supp. 459 (D.N.J.1997). The *Bowers* court found the "core course" requirement essential because it was reasonably necessary to accomplish the purpose of the NCAA program. However, the court also noted that the rule authorized waiver

[15] Plaintiff cites two district court cases in which an individualized inquiry was conducted to determine whether waiving the age rule for the individual plaintiffs would undermine the purpose of the rule, but each was vacated as moot. *See Johnson v. Florida High School Activities Assoc.*, 899 F.Supp. 579 (M.D.Fla.1995), *vacated as moot* 102 F.3d 1172 (11th Cir.1997); *Dennin v. Conn. Interscholastic Athletic Conference*, 913 F.Supp. 663 (D.Conn.1996), *vacated as moot* 94 F.3d 96 (2nd Cir.1996).

of the requirement on a case-by-case basis for individualized consideration and as such was adequate to reasonably accommodate students with learning disabilities. *Id.* at 467.

From this rather limited background of athletic ADA case law, the PGA asserts that the court should focus on whether an athletic rule is "substantive"—*i.e.*, a rule which defines who is eligible to compete or a rule which governs how the game is played. If it is, according to the PGA's argument, the rule cannot be modified without working a fundamental alteration of the competition, and the ADA consequently does not require any modification to accommodate the disabled.

I note, however, that even in those cases most heavily relied upon by the PGA the courts examined the purpose of each of the rules in question to determine if the requested modification was reasonable.

In *Sandison* and *McPherson*, the eligibility requirements imposed were closely fitted with the purpose of high school athletics—to allow students of the same age group to compete against each other. The learning-disabled plaintiffs who had passed beyond the age or semester limits while still remaining in high school could not compete without fundamentally altering the nature of the services at issue. That the plaintiffs in those cases may have been less skilled athletes than their peers missed the point. High school athletics are for youths of a certain age group (14-18). Eliminating the curriculum or age-eligibility requirements for high school athletes clearly changes the fundamental nature of such competition.

Similarly, in *Bowers*, the issue was the "core course" requirement for student-athletes at the collegiate level. An athlete had to be a qualified student to compete. A complete waiver of the academic requirement would obviously alter the fundamental nature of the program, and, as noted, individual assessments and exemptions were permitted.

That is not to say that athletic associations have unfettered discretion to set eligibility requirements as they see fit. May a high school athletic association expressly define eligibility requirements so as to exclude the learning or other disabled? If it did, would the courts simply be left to conclude that any change in such a rule would fundamentally alter the rules of competition and by virtue of such be unreasonable? For example, may a high school league promulgate a rule prohibiting competitors from using corrective lenses to assist their vision at athletic events—and be immune from ADA scrutiny because an accommodation to the sight-impaired would fundamentally alter a rule of competition?

Essentially, then, the PGA Tour's contention that it alone may set the rules of competition, and that any modification of any of its rules (which may be necessary to accommodate the disabled) fundamentally alters the nature of PGA tournaments, is simply another version of its argument that the PGA Tour is exempt from the provisions of the ADA. It is not. The court has the independent duty to inquire into the purpose of the rule at issue, and to ascertain whether there can be a reasonable modification made to accommodate plaintiff without frustrating the purpose of the rule, and without altering the fundamental nature of PGA Tour competition.

Although the PGA Tour is a professional sports organization and professional sports enjoys certainly, a much higher profile and display of skills than collegiate or other lower levels of competitive sports, the analysis of the issues does not change from one level to the next. High school athletic associations have just as much interest in the equal application of their rules and the integrity of their games as do professionals. Put differently, if it is unreasonable to accommodate Casey Martin's disability with a cart at the PGA Tour level because of its rules of competition, it is equally unreasonable to so accommodate a similarly disabled

golfer at the high school level if the same rules were applicable.

It is also worth noting that the ADA does not distinguish between sports organizations and other entities when it comes to applying the ADA to a specific situation. Businesses and schools have rules governing their operations which are of equal importance (in their sphere) as the rules of sporting events. Conversely, the disabled have just as much interest in being free from discrimination in the athletic world as they do in other aspects of everyday life. The key questions are the same: does the ADA apply, and may a reasonable modification be made to accommodate a disabled individual?

An example from a prior case filing illustrates the tension that exists between the disabled seeking equal access and an entity that must modify its rules or practices to accommodate: A man afflicted with cerebral palsy books an international flight on a commercial airline from Oregon to Germany. The first leg of the flight takes the disabled individual from Eugene, Oregon to Chicago, Illinois, where he changes planes for the next leg of the trip. The captain of the airlines for the international leg, however, decides that the individual's condition (which hasn't changed since the first flight) renders him unfit to travel safely, and so he orders him off the plane. This unfortunate person's journey is interrupted solely because of his disability, and he is relegated to languish in a hotel room (away from his home and away from his destination) until a captain can be found who is willing to admit him as a passenger.[16]

The rule at stake in the above example is the age-old rule that the captain is in charge of the ship. This rule has an obvious and important substantive purpose. Nonetheless, are the disabled not entitled to travel to their destinations with the

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[16] *See* Civil Number 93-6068-TC.

same degree of reliance on their arrangements as the able-bodied? Put differently, doesn't the ADA (or its counterpart, the Rehabilitation Act) require the airlines to modify the rule to provide a reasonable accommodation—i.e., a flight there and back without interruption by an uncomfortable captain—under the specific circumstances of his case, even though such might modify a substantive rule of its operation?

It is with these concepts in mind that I approach Casey Martin's request for an accommodation.

First, I set forth (and perhaps restate to some extent), a general overview of the ADA. As I reject (without detailed elaboration[17]) plaintiff's claims that he is a PGA Tour employee and that the Nike Tour is a "course or examination" under the Act, I will discuss only his remaining claim, *i.e.*, the "public accommodation claim" under Title III of the Act.

Title III of the ADA provides:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.
>
> . . . .
>
> discrimination includes failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of the good, service, facility, privilege, advantage, or

[17] For the most part, I agree with, and incorporate by reference, the argument set forth by defendant in its memorandum in support of summary judgment regarding the employee, and course and exam issues. *See* Defendant's Memo (# 21).

> accommodation being offered or would result in an undue burden.
>
> . . . .
>
> discrimination also includes the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered.

42 U.S.C. §§ 12182(a), 12182(b)(2)(A)(i) and (ii)

The ADA was enacted by Congress in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Congress found that "individuals with disabilities continually encounter various forms of discrimination, including . . . failure to make modifications to existing facilities and practices. . . ." Congress intended to protect disabled persons not just from intentional discrimination but also from "thoughtlessness," "indifference," and "benign neglect." *See Crowder v. Kitagawa*, 81 F.3d 1480, 1483-1484 (9th Cir.1996).

ADA defines disability with respect to an individual as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2).

The phrase physical or mental impairment means:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

28 C.F.R. § 36.104(1).

The phrase major life activity means:

functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

28 C.F.R. § 36.104(2).

The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

1. the nature and severity of the impairment;

2. the duration or expected of the impairment; and

3. the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j)(2).[18]

Temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually

[18] The regulations concerning temporary impairments are found in the section concerning Title I (employment) of the ADA, but are useful in determining whether a disability exists under Title III.

not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, etc. *Sanders v. Arneson Products*, 91 F.3d 1351, 1354 (9th Cir.1996). Temporary injury with minimal residual effects cannot be the basis for a sustainable claim under the ADA. *Id.*

Plaintiff has the burden of demonstrating that he is disabled and has done so. Plaintiff also has the burden of proving that a modification was requested and that the requested modification is reasonable. "Plaintiff meets this burden by introducing evidence that the requested modification is reasonable in the general sense, that is, in the general run of the cases." *Johnson v. Gambrinus Co.*, 116 F.3d 1052, 1059 (5th Cir.1997). With respect to this element, the use of a cart is certainly not unreasonable in the game of golf. As noted hereafter, the Rules of Golf do not require walking, and even the PGA Tour permits cart use at two of the four types of tournaments it stages.[19] While the PGA Tour permits cart use at those two events, it imposes no handicap system or stroke penalties on those who opt for carts as opposed to those who elect to walk. This is certainly compelling evidence that even the PGA Tour does not consider walking to be a significant contributor to the skill of shot-making. In addition, the NCAA and PAC 10 athletic conference permit the use of carts as an accommodation to disabled collegiate golfers. Under the Johnson analysis such evidence meets plaintiff's burden of demonstrating that a cart is a reasonable

[19] The PGA Tour stages the PGA Tour, senior PGA Tour, the Nike Tour, and the Qualifying School Tournament. The Senior Tour is for PGA Tour golfers of 50+ years in age. The Qualifying School Tournament screens those who are competing for entry into the PGA Tour and Nike Tour. The PGA Tour admits the most skilled golfers; the Nike Tour admits those at the next highest level. The PGA Tour allows cart use on the Senior PGA Tour and in the two preliminary rounds of the Qualifying School Tournament.

modification to accommodate his disability in the game of golf in the general sense, that is in the general run of cases.

Defendant then must make the requested modification unless it meets its burden of proving that the requested modification would fundamentally alter the nature of its public accommodation. "The type of evidence that satisfies this burden focuses on the specifics of the plaintiff's or defendant's circumstances and not on the general nature of the accommodation." Id. Defendant argues that an individualized inquiry into the necessity of the walking rule in Casey Martin's case is not appropriate. *See e.g., Pottgen*, 40 F.3d at 930-31. However, Johnson suggests otherwise. An individualized assessment finds support in the Ninth Circuit as well. *See Crowder*, 81 F.3d at 1486 ("the determination of what constitutes reasonable modification is highly fact-specific, requiring case-by-case inquiry"); *see also Stillwell v. Kansas City, Missouri Bd. of Police Commissioners*, 872 F.Supp. 682, 687 (W.D.Mo.1995) (individualized assessment necessary to determine if plaintiff can meet the purpose of defendant's rule). Thus, the ultimate question in this case is whether allowing plaintiff, given his individual circumstances, the requested modification would fundamentally alter PGA and Nike Tour golf competitions.[20]

The Rules of Golf

The general "Rules of Golf" are promulgated by the United States Golf Association (USGA) and the Royal and Ancient Golf Club of St. Andrews, Scotland (R & A).

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[20] At this stage of the analysis, I agree with the PGA that only the nature of PGA and Nike Tour golf may be considered in determining whether the requested modification would cause a fundamental alteration. However, as noted, I do not agree with defendant's position that this analysis is to be undertaken without an individualized assessment of Casey Martin's disability.

Rule 1-1 provides as follows:

> The Game of Golf consists in playing a ball from the teeing ground into the hole by a stroke or successive strokes in accordance with the rules.

Nothing in the Rules of Golf requires or defines walking as part of the game. In its reported Decisions on the Rules of Golf regarding the Rules of Golf, the USGA has expressed that it is permissible to ride a cart in golf unless such is prohibited by the local rules defining the conditions of competition for particular events. In Appendix I to the Rules of Golf we find:

> Transportation
>
> If it is desired to require players to walk in a competition, the following condition is suggested:
>
> Players shall walk at all times during a stipulated round.

The PGA Tour promulgates a pamphlet entitled "Conditions of Competition and Local Rules" which govern PGA Tour and Nike Tour tournaments. The preamble to this document provides, in pertinent part, as follows:

> The Rules of the United States Golf Association govern play, as modified by the PGA Tour.
>
> One of those modifications appears in Section A--Conditions of Competition:
>
> ¶ 6 *Transportation--Appendix I*
>
> Players shall walk at all times during a stipulated round unless permitted to ride by the PGA Tour Rules Committee.

No written policy has been cited by either party which governs the Rules Committee in its exercise of discretion regarding a waiver of the walking requirement. On the

occasions when the walking rule has been waived, it has been waived for all competitors (e.g., to shuttle players from the 9th green to the 10th tee where considerable distance is involved). No waiver has ever been granted for individualized circumstances (such as disability).

Prior to requesting use of a cart as an accommodation for his disability, plaintiff explored the possibility of various artificial aids to walking. I allow Dr. Jones to describe what those were, and why they won't work:

> By August 1996 at the age of 24, Casey reported to me that he was having tremendous difficulty with ambulation. He was having great difficulty walking 18 holes of golf. He was not only having trouble with the golf, but was also now having significant discomfort with the requirements of daily living. At this point I immobilized his leg in a removable brace and started a physical therapy program. Neither was beneficial.
>
> By now Casey was becoming extremely frustrated, so I decided to accompany him during a number of rounds during the summer of 1996.

Q. You are talking about rounds of golf?

A. Rounds of golf.

Q. Okay.

A. In hopes that I could observe some characteristics of his gait that would allow me to provide him with some form of stabilizing device. During this time, we tried in—shoe orthosis; that is, shoe inserts, which were of minimal benefit.

Q. What were they intended to do?

A. They will stabilize the hindfoot, and there's a bio-mechanical region whereas if you stabilize the hindfoot, the tibia doesn't rotate with the gait and will hopefully

decrease the pain.

Q. The right leg is slightly longer also?

A. Yes.

Q. Okay. And that right leg being longer, is due to this condition?

A. Yes.

Q. Okay. All right. What was next?

A. We also placed him into ankle-foot orthosis. Now, that's a plastic brace that extended from the toes to the mid-calf and is for the purpose of stabilizing his hindfoot and, also, protecting his tibia. Casey found that it was virtually impossible to golf in this device because it limited his hindfoot motion as well as the fact that it caused considerable discomfort over his calf which is very sensitive. It was during this time that I became increasingly concerned about the well being of Casey's lower extremity. I can recall playing two rounds of Golf with Casey where he was unable to finish the 18 holes while walking. I also recall this summer one round of golf where we used a golf cart. The ground was moderately wet and unstable. We could not park as close to the tee box or to the green as we normally would. As a result, Casey, had to stop his round at about the 14th hole because he was having difficulty just getting to the tee box and green.

Transcript (#) at pp. 88-90.

Thus, Casey Martin cannot walk the course, and only a cart will permit him to compete on the Nike Tour. As with the disabled airline passenger, he finds himself in conflict with a substantive rule of operation.

According to the PGA Tour, the purpose of the walking rule is to inject the element of fatigue into the skill of shot-

making. I accept that assertion and expressly find from the evidence produced at trial that such is a cognizable purpose[21] of the rule from the standpoint of the ADA.

The question thus is—may the walking rule be modified to accommodate Casey Martin without fundamentally altering the nature of the game being played at the PEA Tour's tournaments?

In answering the question, as noted previously, I reject the defendant's contention that the plaintiff's individual circumstances are irrelevant to the inquiry. *See Johnson, Crowder, Stillwell*, cited *supra* p. 1249.

Furthermore, the fatigue factor injected into the game of golf by walking the course cannot be deemed significant under normal circumstances. Dr. Gary Klug, a professor in physiology at the University of Oregon, and an expert on the physiological basis for fatigue, calculates that approximately 500 calories are expended in walking a course of golf (approximately 5 miles of walking in a 5 hour time period). He describes the energy expenditure as follows: "nutritionally it's less than a Big Mac." He further notes that these calories are expended over a 5 hour period, and that the golfers have numerous intervals of rest and opportunities for refreshment (or calorie replacement).

While the PGA Tour cited Ken Venturi's memorable 1964 U.S. Open win in which he overcame severe and near-fatal exhaustion as he finished the course in high heat and humidity, Dr. Klug indicates that Mr. Venturi's fatigue was induced by heat exhaustion and fluid loss—not walking. According to Dr. Klug, tests have disclosed that fatigue from exercise—as measured by oxygen consumption—is not significantly influenced by heat or humidity. Rather,

[21] Mere tradition would not be a cognizable purpose—i.e., one entitled to any weight.

dehydration is the critical factor in such situations. Many spectators at the 1964 U.S. Open had to be treated for exhaustion as well, and they were not walking.

Furthermore, fatigue at lower intensity exercise[22] is primarily a psychological phenomenon, according to Dr. Klug. Stress and motivation are the key ingredients here. Place an individual in the middle of the Los Angeles freeway at rush hour, and he will get fatigued in a hurry without moving a muscle. If someone pedals a bicycle for 30 minutes and says "I've had it," but is promised $1,000 if he goes another 5 minutes, his fatigue may well disappear.

Every individual differs in their psychological fatigue components, but walking has little to do with such components. If anything, from the evidence introduced at trial, most PGA Tour golfers appear to prefer walking as a way of dealing with the psychological factors of fatigue.[23]

[22] Walking 5 miles in 5 hours cannot be equated with high intensity exercise. A requirement of running, or even walking, 5 miles at a continuous gait would certainly induce more fatigue from the physiological standpoint, but that is not what the PGA Tour requires. To quote from Nike Tour golfer Eric Johnson:

> Q. does [walking] create any problem for you?
>
> A. Not more than the temperature outside would cause a person to sweat just standing there or cause a person to be very cold just standing there. There are--there are cases and instances where we play golf courses that are hilly where you might have to walk up a hill, and you would be more exerted when you get to the top of the hill than if you were walking a flat surface or downhill. But because of the pace of play and our preshot routines, we know to not to hit when we are winded or we know not to hit until we are ready to hit the golf ball. So I can't think of a time in my golfing career where I've ever hit a golf shot where I've felt that I wasn't ready to hit.

Transcript (#) at p. 33.

[23] As Nike Tour pro Eric Johnson described when asked why he preferred to walk:

When given the option of cart-riding or walking—such as at the Senior PGA Tour or PGA Tour Qualifying Tournament--the vast majority have opted to walk. Why would this be if walking truly fatigued them so that they hit worse shots than if they ride? As the saying goes, "the proof of the pudding is in the eating."

And then we come to Casey Martin's unique circumstances. If the majority of able-bodied elect to walk in "carts optional" tournaments, how can anyone perceive that plaintiff has a competitive advantage by using a cart given his condition?

The fatigue plaintiff endures just from coping with his disability is undeniably greater than the fatigue injected into tournament play on the able- bodied by the requirement that they walk from shot to shot. Walking at a slow pace[24]—to

---

I prefer to walk, probably for a number of reasons. One, it's how I've played golf most of my life, and it keeps me in rhythm. There are times when I would prefer to walk because the temperature outside is such that if you are in the golf cart, the wind chill factor drops when you are riding in it and you are too cold. Weather's a real large contributing factor in walking. I would much rather walk if it was raining because I am able to stay under my umbrella and not get as wet, my equipment stays dry, those types of things.

Q. All right. Are you better able to get the feel of the course when you walk as opposed to ride, or do you know?

A. You get a full effect of the elements. Everything from changes in wind direction from one part of the fairway to the other, to being able to watch what the flag stick's doing on the green, to walking down the fairway versus being in the golf cart trying not to run somebody over.

Transcript (#) at p. 17.

[24] The PGA Tour does not require golfers to walk rapidly to their next shot. There do not appear to be any time limits on getting to the ball, although a golfer has 5 minutes to find a lost ball. Once at the ball, a golfer has 40 seconds to hit it. If a golfer is closest to the hole, he has additional time to rest while the other members of his group hit their shots.

the able-bodied—is a natural act, of little more difficulty than breathing. It is how we were designed to move from place to place.

Walking for Casey Martin is a different story.

In the first place, he does walk while on the course—even with a cart, he must move from cart to shot and back to the cart. In essence, he still must walk approximately 25% of the course. On a course roughly five miles in length, Martin will walk 1 1/4 miles.

The plaintiff is in significant pain when he walks, and even when he is getting in and out of the cart. With each step, he is at a risk of fracturing his tibia and hemorrhaging. The other golfers have to endure the psychological stress of competition as part of their fatigue; Martin has the same stress plus the added stress of pain and risk of serious injury. As he put it, he would gladly trade the cart for a good leg. To perceive that the cart puts him—with his condition—at a competitive advantage is a gross distortion of reality.

As plaintiff easily endures greater fatigue even with a cart than his able- bodied competitors do by walking, it does not fundamentally alter the nature of the PGA Tour's game to accommodate him with a cart.

It lends emphasis to the point that the walking rule may be modified without fundamentally altering the PGA's game to consider several other PGA rules in a hypothetical context.

Rule 6-4 of the Rules of Golf specifies:

Caddie

The player may have only one caddie at any one time, under penalty of disqualification.

Rule 8 provides:

Advice; Indicating Line of Play

Definitions

"Advice" is any counsel or suggestion which could influence a player in determining his play, the choice of a club or the method of making a stroke.

Information on the Rules or on matters of public information, such as the position of hazards or the flagstick on the putting green, is not advice.

The "line of play" is the direction which the player wishes his ball to take after a stroke, plus a reasonable distance on either side of the intended direction. The line of play extends vertically upwards from the ground, but does not extend beyond the hole.

And Rule 8-1 states:

Advice

During a stipulated round, a player shall not give advice to anyone in the competition except his partner. A player may ask for advice during a stipulated round from only his partner or either of their caddies.

May these be modified to accommodate a disabled golfer--e.g., a blind golfer?

Interestingly, the USGA promulgates a pamphlet entitled *A Modification of the Rules of Golf for Golfers with Disabilities*. The Preface to the Pamphlet reads:

> This publication contains permissible modifications to the Rules of Golf for use by disabled golfers. This is not intended to be a revision of the Rules of Golf as they apply to able-bodied players. As is the case for the Rules of Golf themselves, these modifications, along with the philosophy expressed herein, have been agreed upon by the United States Golf Association and the Royal and Ancient Golf Club of St. Andrews, Scotland.

Under the category of Blind Golfers, the pamphlet provides:

Definition of "Coach"

The status of the coach and the duties which he may perform should be defined clearly. Without such clarification, it would be difficult, for example, to determine how a blind golfer must proceed if his ball were to strike his or another player's coach after a stroke. Therefore, the following definition is recommended:

> Coach
>
> A "coach" is one who assists a blind golfer in addressing the ball and with the alignment prior to the stroke. A coach has the same status under the rules as a caddie.
>
> Note: A player may ask for and receive advice from his coach.

And the Caddie and Advice rules are modified as follows:

Rule 6-4 (Caddie)

There is nothing in the rules which would prohibit the coach of a blind golfer from functioning as his caddie. For a variety of reasons, however, a coach may not be able to perform the duties of a caddie. Therefore, it is permissible for a blind golfer to have both a coach and a caddie. In such circumstances, however, the coach may not carry or handle the player's clubs except in helping the player take his stance or him as permitted by analogy to Decision 6-4/4.5. Otherwise, the player would be subject to disqualification for having more than one caddie.

Rule 8-1 (Advice)

In view of the Definition of "Coach," it is recommended that Rule 8-1 be modified as follows:

8-1. Advice

During a *stipulated round*, a player shall not give *advice* to anyone in the competition except his partner. A player may ask for advice during a stipulated round from only his partner, either of their caddies or, if applicable, their coaches.

Judy Bell, a former president of the USGA, testified that the Golfers with Disabilities pamphlet was not meant for the PGA Tour, but only for recreational golfers. While that may be, it begs the question of how the PGA Tour would handle the request of a blind pro golfer to have a coach in addition to a caddie. At oral argument, the attorney for the Tour was asked whether Rules 6- 4 and 8-1 could be modified without fundamentally altering the nature of the PGA's competition. To quote from the colloquy:

THE COURT: How about the caddie and the coach for the blind golfer, as the pamphlet describes?

MR. MALEDON: Your Honor, my answer would be the same. As long as it does not fundamentally alter the nature of the competition, there's not a problem with it. But again, You Honor, you'd have known the facts. You'd have to look at the purpose for the rule. And I submit to you, Your Honor, that engaging in those kinds of analogies do not advance the ball in terms of what we are talking about here.

THE COURT: If I look at whether the purpose of the walking rule is to enhance competition by injecting fatigue into the equation, do I look at what Mr. Martin's disability does to him specifically insofar as inducing fatigue?

MR. MALEDON: No, Your Honor Absolutely not.

The paradox presented in the PGA Tour's position is readily apparent. A modification of the "one caddie only" rule to accommodate a blind golfer by providing him with a coach does not become the "reasonable" thing to do unless the PGA first conducts an individualized assessment of the golfer's disability--i.e., the PGA Tour must first recognize that he is blind, and then consider whether providing him a coach under his circumstances would give him a competitive advantage over the other golfers who aren't blind and thus don't need a coach. Yet in Casey Martin's situation, the PGA Tour adamantly refuses to assess the requested modification in light of the specifics of his disability. Inconsistently, it insists in this case that any modification of any of its rules would fundamentally alter the nature of its competition.

The rules, as demonstrated, are not so sacrosanct. The requested accommodation of a cart is eminently reasonable in light of Casey Martin's disability.

SO ORDERED.

UNITED STATES DISTRICT COURT
D. OREGON.

No. CIV. 97-6309-TC.

CASEY MARTIN,
Plaintiff,

v.

PGA TOUR INC., a Maryland corporation,
Defendant.

Jan. 30, 1998.

ORDER

COFFIN, United States Magistrate Judge:

Plaintiff brings this action pursuant to the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213. On January 26, 1998, the court heard oral arguments on defendant PGA TOUR's motion (# 20) for summary judgment and plaintiff Casey Martin's cross-motion (# 44) for partial summary judgment. After argument, the court made oral findings and rulings, denying the Tour's motion in part and granting Martin's motion in part. This written order supplements and elaborates on the oral findings.

BACKGROUND

The ~~PGA Tour~~ is a non-profit association of professional golfers. The PGA sponsors and cosponsors professional golf events on three tours: the regular PGA Tour, with approximately 200 players at any given time; the Senior PGA Tour, with approximately 100 players; and the Nike Tour, with approximately 170 players.

There are various ways to gain playing privileges on the tours conducted by the PGA. Chief among them is a three-stage qualifying school tournament. The first stage consists of 72 holes. Those who score well enough in this stage advance to the second stage consisting of 72 holes. The top qualifiers, approximately 168 players, advance to the third and final stage consisting of 108 holes. The lowest 35 finishers plus ties are awarded playing privileges on the regular PGA Tour. The next 70 lowest scoring players obtain privileges to play on the Nike Tour. A player failing to qualify for the regular PGA Tour, but qualifying for the Nike Tour may obtain the privilege to play on the PGA Tour by winning three Nike Tour tournaments during a single season or by finishing in the top fifteen places on the Nike Tour money list.

To enter the qualifying school tournament, a prospective player must pay a $3,000 fee and submit two letters of reference. Plaintiff in this case entered the qualifying school tournament and made it through the first and second stages.

In the first two stages of the qualifying tournament, players are permitted to use golf carts. In the third stage, as well as on the regular PGA Tour and the Nike Tour, players are required to walk and are required to use caddies.[25] Plaintiff contends he suffers from a debilitating disease known as Klippel-Trenaunay-Weber Syndrome, and for purposes of this motion the Tour does not contest this assertion. Klippel-Trenaunay-Weber Syndrome is a venous malformation which curtails blood circulation in plaintiff's right leg. This condition has resulted in significant atrophy in the lower leg and bone deterioration of the tibia. Plaintiff further contends that his physical impairment substantially limits his ability to walk. Plaintiff filed this action, pursuant to the ADA, seeking

[25]Golf carts are permitted on the Senior PGA Tour which involves golfers 50 years and older.

to enjoin defendant's "no cart" rule during the third stage of the qualifying school tournament, and on the PGA and Nike Tours. Plaintiff asserts that by failing to provide him with a cart, defendant fails to make its tournaments accessible to individuals with disabilities in violation of the ADA.

This court granted a preliminary injunction directing defendant to allow plaintiff to use a cart during the third stage of the qualifying school tournament. Defendant then lifted the no cart rule for all players during the third stage of the qualifying school tournament. Plaintiff scored well enough in the tournament to attain playing privileges on the Nike Tour. This court extended the injunction by stipulation of both parties to include the first two tournaments on the Nike Tour. Defendant now moves for summary judgment contending that the ADA does not apply to it or its tournaments.

STANDARDS

Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552- 53, 91 L.Ed.2d 265 (1986). Rule 56(c) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a

matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. *Id.* at 323, 106 S.Ct. at 2552. There is also no genuine issue of fact if, on the record taken as a whole, a rational trier of fact could not find in favor of the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538 (1986); *Taylor v. List*, 880 F.2d 1040 (9th Cir.1989).

On a motion for summary judgment, all reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir.1976). The inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Valandingham v. Bojorquez*, 866 F.2d 1135, 1137 (9th Cir.1989). Where different ultimate inferences may be drawn, summary judgment is inappropriate. *Sankovich v. Life Insurance Co. of North America*, 638 F.2d 136, 140 (9th Cir.1981).

DISCUSSION

Plaintiff alleges in his first claim for relief that defendant is a private entity which is or operates a place of public accommodation. As a result, plaintiff contends that defendant is subject to the ADA's prohibition of discrimination on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to) or operates a place of public accommodation. *See* 42 U.S.C. § 12182. Plaintiff alleges in his second claim that defendant is a private entity that offers examinations or courses related to applications, licensing, certifications, or credentialing for professional or trade purposes. Plaintiff thus contends that defendant is

subject to the ADA's requirement that any person offering examinations or courses related to applications, licensing, certification, or credentialing for professional or trade purposes shall do so in a place and manner accessible to persons with disabilities. *See* 42 U.S.C. § 12189. Plaintiff alleges in his third claim that defendant is an employer as defined in the ADA. *See* 42 U.S.C. § 12111(5). Thus, plaintiff contends that defendant is prohibited from discrimination against a qualified individual with a disability because of the disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a).

Defendant PGA Tour contends that it is entitled to summary judgment on all three of plaintiff's claims because it is a private non-profit establishment exempt from the ADA. *See* 42 U.S.C. § 12187.[26] Defendant argues, in the alternative, that even if it is not a private club it is entitled to summary judgment on counts one and two of plaintiff's complaint because the PGA and Nike Tour competitions do not constitute "places of public accommodation," and that the Nike Tour is not an examination or course. In addition, defendant argues that it is entitled to summary judgment in count three of plaintiff's complaint because plaintiff is not an "employee" of the PGA Tour.

A. Defendant is not Exempt from the ADA

As noted, a private club or establishment is exempt from coverage under Title III of the ADA (as well as Title II of the

[26] The exemption from coverage under the ADA found at 42 U.S.C. § 12187 applies to Title III of the ADA (public accommodations and services operated by private entities). With respect to Title I (prohibiting discrimination with regard to employment), an employer does not include a bona fide private membership club. *See* 42 U.S.C. § 12111(5)(B).

Civil Rights Act of 1964, which prohibits discrimination on the grounds of race, color religion, or national origin). Because of the importance of these laws, exemptions are narrowly construed and the burden of proof rests on the party claiming the exemption. *See Nesmith v. YMCA*, 397 F.2d 96, 101 (4th Cir.1968); *Quijano v. University Federal Credit Union*, 617 F.2d 129, 131-32 (5th Cir.1980).

Before one can answer the question of whether the PGA Tour is entitled to the private club exemption, one must first define the nature of the entity:

Succinctly put, the Tour is an organization formed to promote and operate tournaments for the economic benefit of its members, a highly skilled group of professional golfers. As with all professional sports organizations, the Tour is part of the entertainment industry, offering competitive athletic events to the public, which in turn generate sponsorship of the events, network fees, advertising revenue, and, ultimately, the tournament prize money awarded the competitors.

The Tour, in short, is a commercial enterprise. The success of the Tour in generating revenue for its members is in direct proportion to public participation as spectators and viewers of the Tour's tournaments. Without this public participation, the primary objective of the Tour could not be achieved.

One of the principal cases relied upon by the PGA for its exemption claim actually cuts against its position:

In *Welsh v. Boy Scouts of America*, 993 F.2d 1267 (7th Cir.1993), the court found that the Boy Scouts was indeed a private club notwithstanding its membership total of over five million scouts.[27] [FN3] The *Welsh* court focused keenly on the purpose of membership in the Scouts when it criticized the dissenter's emphasis on the size of the organization:

[27] Although the Welsh case involved the Civil Rights Act, the ADA and the Civil Rights Act are interrelated in terms and application.

> The dissent concludes that because the Boy Scouts have five million members ... it is neither selective nor private.... This conclusion not only exaggerates the facts, it ignores the purpose of the Scouts' existence and punishes the Boy Scouts for its success in recruiting future quality leaders of society. Certainly Congress did not intend to condition the private club exclusion from Title II on the popularity of the organization. *The more pertinent factor regarding selectivity is the nexus between the organization's purpose and its membership requirements.*

Id. at 1277. (emphasis added).

Regarding that purpose, the court had earlier observed:

> The purpose of Scouting ... is to equip youth of all races, colors and creeds to fulfill their duty to God, to mature personally, and to help others. This can only be achieved by a boy who believes in God. How does one who denies the very existence of a Supreme Being presuppose to follow the Oath of the Boy Scouts of America?

Id.

Just as the large membership in the Scouts did not deprive the organization of its private club status when its membership requirements were fitted with the purpose of the group, so the relatively small membership of the PGA Tour does not confer private status on this entity when its selectivity is counterbalanced with the Tour's purpose. Generating revenue for members scarcely seems to qualify as the type of protectable interest Congress had in mind when it excluded private clubs from coverage under the ADA and Civil Rights Act.

In *Quijano v. University Federal Credit Union*, 617 F.2d 129 (5th Cir.1980), the court ruled that the private membership club exception to the Civil Rights Act did not apply to a federally chartered credit union, notwithstanding its non-profit status. In doing so the court observed:

> One rarely abandons the path of logic and common sense when Webster is consulted for the precise meaning of a term. In reference to the type of club suggested by section 701(b)(2) exemption Webster's Third International Dictionary of the English Language offers the following definition at page 430:
>
> > club: an association of persons for social and recreational purposes or for the common promotion of some common object (as literature, science, political activity) usually jointly supported and meeting periodically, membership in social clubs usually being conferred by ballot and carrying the privilege of use of the club property.
>
> ....
>
> Credit unions, however useful they may be, exist for purely mercantile purposes and although they may be organized on a non-profit basis, member join credit unions in search of profits on their investments. Like . . . "auto clubs," credit unions are not clubs in any sense of the word.

Id. at 131, 133.

An analysis of the set of variables most commonly weighed by the courts in determining whether an organization is a bona fide private club mitigates against such a finding here. Those factors, as set forth in *United States v. Lansdowne Swim Club*, 713 F.Supp. 785 (E.D.Pa.1989) are listed and discussed as follows:

1. Genuine Selectivity

The Tour contends that because only very few golfers possess the requisite skills to become members of the Tour and compete at its events, and because these golfers are selected through competition at qualifying tournaments, its members are chosen through an exceptionally selective process and this factor weighs heavily in its favor.

Defendant's eligibility requirements, however, measure skills. They are not designed to screen out members based upon social, moral, spiritual, or philosophical beliefs, or any other criteria used to protect freedom of association values which are at the core of the private club exemption. *See Quijano*, 617 F.2d 129; *Welsh*, 993 F.2d 1267. *See also United States v. Jordan*, 302 F.Supp. 370, 376 (consideration is given to whether the organization has a civic, fraternal, or social purpose accomplished through membership screening). As with all sports, only the most skilled players achieve professional status. The pool of professional competitors will always be an extremely small percentage of those who participate in the sport at recreational or other non-professional levels, not to mention the general public. Such natural "weeding-out" selectivity is inherent to athletics, and does nothing to confer "privacy" to the organizations to which professionals matriculate.

2. Membership Control

Professional golfers who play in fifteen or more regular PGA Tour events in a year have voting rights.[28] But—which seems more to the point—new members are not voted in by the current members—they play their way in. *See Jordan*, 302 F.Supp. at 375 (consideration is given to whether the existing members have any control over the admission of

[28] The voting rights these golfers have is limited to voting for player directors from a slate of candidates chosen by the existing player directors. Only four members of the policy board, consisting of nine members, are player directors.

applicants for membership). The membership control of the organization does little to make it or keep it "private."

3. History of Organization

The organization has existed since 1968. It clearly was not formed to evade the Civil Rights Act or ADA. Of course, the fact that an organization is not a "sham" tells us it is "bona fide," but not that it is a "private club."

4. Use of Facilities by Nonmembers

Defendant contends that only its members participate as players in Tour Events. Plaintiff points to numerous nonmembers who participate in the tournaments as vendors, reporters, score keepers, volunteers, and members of the gallery.

The court finds this factor cuts against private club status. Of particular force is the heavy reliance by the Tour on public participation for the purpose of generating revenue for the tour. *See Smith v. YMCA*, 462 F.2d 634, 648 (5th Cir.1972) (a YMCA which enjoyed a substantial amount of revenue from the general public was not a private club); *Evans v. Laurel Links, Inc.*, 261 F.Supp. 474 (E.D.Va.1966) (a golf club which opened its lunch counter to the public, which restaurant generated $27,568 in revenue for the club, thereby subjected the entire golf course to the Civil Rights Act).

5. Club's Purpose

As discussed previously, the mercantile purpose of the PGA Tour weighs heavily against private club status.

6. Whether the Club advertises for Members

Courts have held that organizations which advertise and solicit new members do not fall within the private club exemption. *See Wright v. Salisbury Club, Ltd.*, 632 F.2d 309 (4th Cir.1980).

The PGA Tour is extensively covered by the media. Its existence is well known to even the most casual golfers and followers of sports. The Tour has no more need or incentive to advertise for golfers than do the Chicago Bulls for basketball players. The advertising factor carries little weight in the arena of professional sports.

7. Whether the Club is Nonprofit

The Tour is nonprofit, but yet its fundamental purpose is to enhance profits for its members. As in *Quijano*, the nonprofit status of a corporation that exists to further the commercial interests of its members does not weigh in favor of exempt status.

For the reasons stated, I reject the PGA Tour's argument that it is a private club and as such exempt from the ADA.

B. Defendant Operates a Place of Public Accommodation at the Golf Courses on which it Conducts its Tournaments

Defendant further contends that, if it is not found to be an exempt private club, the courses it operates are not open to the "general public" between the boundaries of play during its tournaments, and thus the tournament events are not "places of public accommodation."[29]

The term "public accommodation" is specifically defined to include the following places:

> (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
>
> (B) a restaurant, bar, or other establishment serving food or drink;

[29] Under the ADA, reasonable accommodations must be afforded the disabled using places of public accommodations.

> (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
>
> (D) an auditorium, convention center, lecture hall, or other place of public gathering;
>
> (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
>
> (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
>
> (G) a terminal, depot, or other station used for specified public transportation;
>
> (H) a museum, library, gallery, or other place of public display or collection;
>
> (I) a park, zoo, amusement park, or other place of recreation;
>
> (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
>
> (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
>
> (L) a gymnasium, health spa, bowling alley, *golf course*, or other place of exercise or recreation.

42 U.S.C. § 12181(7) (emphasis added).

A golf course is specifically included on the list.

Defendant argues, however, that its courses are only places of public accommodation in those areas actually accessed by

the public at large. It contends that since the public gallery is not allowed inside the playing area, the fairways and greens of its golf courses are not places of public accommodation.

This argument is flawed.

First, if the PGA were correct, this renders the private club exemption virtually irrelevant to the issue of whether so-called private country clubs, for example, must comply with the ADA. Using the logic of the PGA, if the country club were found not to be a "bona fide private membership club" (as the term is discussed in the previous section), it could nonetheless refuse to accommodate any handicapped members by pointing out it only admits the country club's members (and not the public at large) on its grounds.

Second, the statute and regulations do not support the concept that places of public accommodation have zones of ADA application. PGA cites cases wherein private facilities do not lose their exempt status on the private portions of its facilities simply by operating a discrete public accommodation area (e.g., a private country club renting space to a private day care center open to nonmembers has ADA obligations only with respect to the day care center, according to DOJ regulations). But this is a far cry from the proposition that an operator of a place of public accommodation can create private enclaves within the facility of public accommodation and thus relegate the ADA to hop-scotch areas. May the day care center in the above example rope off a section for use only by the country club's members and be exempt from the ADA within those boundaries? I think not.

The PGA further cites, as an example of dual public/private zones of public accommodation places, the typical major league baseball stadium. The PGA argues that the bleachers are subject to the ADA because that is where the public is

seated, but the dugout is not because the public is not allowed to mingle with the players therein.

What about a disabled manager of a team? May the St. Louis Cardinals refuse to construct a wheelchair ramp to the visitor's dugout to accommodate a disabled manager of the Chicago Cubs simply because spectators cannot go into the dugout?

In a somewhat similar case regarding the Rose Garden Arena, Magistrate Judge Donald Ashmanskas in finding that the executive suites in the arena, even though not open to the general public, are subject to the ADA stated:

> Many facilities that are classified as public accommodations are open only to specific invitees. For instance, a facility that specializes in hosting wedding receptions and private parties may be open only to invitees of the bride and groom, yet it clearly qualifies as a public accommodation. *See* 42 U.S.C. § 12181(7). Attendance at a political convention is strictly controlled, yet the convention center is still a place of public accommodation. *See* 42 U.S.C. § 12181(7). A gymnasium or golf course may be open only to authorized members and their guests, but that does not necessarily preclude it from being classified as a place of public accommodation. Id. A private school may be open only to enrolled students, but it is still a place of public accommodation. *Id.*

Independent Living Resources v. Oregon Arena Corp., 982 F.Supp. 698, 758- 59 (D.Or.1997)

What the PGA also overlooks is that people other than its own Tour members are indeed allowed within the boundary lines of play during its tournaments. What if a member-golfer opted to hire a disabled caddy? Once the caddy steps within the boundaries of the playing area of the golf course—a statutorily defined place of public accommodation—does he

step outside the boundaries of the ADA simply because the public at large cannot join him there? If this were the law, how could such be reconciled with the inclusion of private schools, whose corridors, classrooms, and restrooms are clearly not accessible to the public, on the list of places of public accommodations?

Accordingly, I reject defendant's argument that the ADA does not apply to the areas of competition on the golf course during tournaments.

C. Issue of Employment and Whether the Nike Tour is a Course or Examination

Whether plaintiff is an employee of the Tour and whether the Nike Tour constitutes an examination or course within the meaning of the ADA are issues that I defer until the trial of the case.

CONCLUSION

For the reasons stated above, defendant's motion (# 20) for summary judgment is denied. Plaintiff's motion (# 44) for partial summary judgment is granted as to the issue of whether defendant is exempt from the ADA and whether defendant operates a place of public accommodation, and is otherwise denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Case No. 97-6309-TC

CASEY MARTIN,

Plaintiff,

v.

PGA TOUR, INC., a MARYLAND CORPORATION,

Defendant.

JUDGMENT AND PERMANENT INJUNCTION

The Court having presided at trial in this matter, without a jury, and having found in favor of Plaintiff and against Defendant and having thereafter entered Findings of Fact and Conclusions of Law in an order dated February 19, 1998, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Judgment is entered in favor of Plaintiff Casey Martin, and against Defendant PGA TOUR, Inc. (PGA TOUR) on Count One of Plaintiff's Amended Complaint alleging that the PGA TOUR is a place of public accommodation and that it discriminated against Plaintiff in violation of Title III of the Americans with Disabilities Act, 42 USC § 12101, *et. seq.* (the "ADA") by failing to provide him with automotive transportation in competitions in which Plaintiff is eligible to participate. Judgment is entered in favor of PGA TOUR, and against Plaintiff Casey Martin, on Count Two of Plaintiff's Amended Complaint alleging that the NIKE TOUR constitutes a "course and examination" under Title III of the ADA, and judgment also is entered in favor of PGA TOUR, and against Plaintiff Casey Martin, on Count Three of

Plaintiff's Amended Complaint alleging that Plaintiff is an "employee" of the PGA TOUR and that the PGA TOUR discriminated against Plaintiff because of his disability in violation of Title I of the ADA.

2. The Court hereby enters a Permanent Injunction requiring Defendant PGA TOUR to provide Plaintiff with automotive transportation in NIKE TOUR and PGA TOUR competitions in which Plaintiff is eligible to participate (and any qualifying, preliminary or practice rounds associated with these events).

3. Automotive transportation shall be subject to the terms and conditions agreed upon by the parties. In the event the parties are unable to arrive at an agreement, the Court shall retain continuing jurisdiction to resolve any dispute in this regard between the parties.

4. Plaintiff may file an application for his reasonable costs and attorney fees for the services provided by William Wiswall and the law firm of Wiswall & Walsh, P.C. and by Walters, Romm, Chanti & Dickens, P.C. pursuant to Fed. R. Civ. P. 54.

5. There is no just reason for delay and entry of this Judgment shall be made forthwith.

DATED this 4th day of March 1998.

/s/ Thomas M. Coffin
THOMAS M. COFFIN
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Case No. 97-6309-TC

CASEY MARTIN,

Plaintiff,

vs.

PGA TOUR, INC., a MARYLAND Corporation,

Defendant.

I.

Amended Complaint

Americans with Disabilities Act of 1990, 42 USC § 12101 *et seq*. DEMAND FOR JURY TRIAL

NATURE OF THE ACTION

1.

Plaintiff seeks preliminary and permanent injunctive relief and costs and attorney fees for discrimination on the basis of disability.

2.

This action arises under the Americans With Disabilities Act of 1990 (hereinafter the ADA), 42 USC § 12101 *et. seq*.

II.

JURISDICTIONAL ALLEGATIONS

3.

This court has jurisdiction pursuant to 28 U.S.C. § 1331, 1343 and the ADA.

4.

Preliminary and permanent injunctive relief are sought pursuant to the ADA.

5.

Costs and attorney fees may be awarded pursuant to the ADA.

III.

PARTIES

6.

Plaintiff is a citizen of the United States and the state of Oregon, residing in Lane County, Oregon.

7.

At all material times Defendant PGA TOUR, Inc., hereinafter referred to as Defendant, is and was a Maryland corporation, duly organized under the laws of the State of Maryland, doing business throughout the United States and in Oregon.

IV.

STATEMENT OF FACTS.

8.

At all material times Plaintiff had and has a "disability" as defined by the ADA, 42 USC § 12102(2), in that Plaintiff had and has a physical impairment that substantially limits one or more of his major life activities. Plaintiff has Klippel-Treanaunay Weber syndrome which substantially limits his ability to walk.

9.

In September, 1997 Plaintiff applied to enter the 1997 PGA TOUR Qualifying Tournament and was accepted. Plaintiff paid the sum of $3,000 as an application fee. Plaintiff successfully participated in the first and second qualifying stages of the PGA TOUR Qualifying Tournament and qualified to compete in the Final Qualifying Stage.

10

The PGA TOUR and the NIKE TOUR are professional golf tours. Plaintiff was prohibited from entering these tours and from earning compensation and benefits from these tours unless he successfully competed in the PGA TOUR, Inc. Qualifying Tournament, or unless he met other requirements not available to Plaintiff.

11.

The Final Qualifying Stage of the 1997 PGA TOUR Inc., Qualifying Tournament began on December 3, 1997. Defendant's rules prohibited the use of golf carts during the Final Qualifying Stage.

12.

The Court entered a preliminary injunction requiring Defendant to permit Plaintiff to use a golf cart in the Final Qualifying Stage of the 1997 PGA Qualifying Tour.

13.

Plaintiff successfully completed the Final Qualifying Stage of the 1997 PGA Qualifying Tour, qualified to participate in the 1998 NIKE TOUR and was offered and accepted a position on the NIKE TOUR. Defendant prohibits the use of a golf cart in NIKE and PGA TOUR events. Because of his disability, Plaintiff cannot effectively compete in the NIKE TOUR or the PGA TOUR or obtain compensation, benefits, privileges or advantages from the NIKE TOUR or the PGA TOUR unless he is permitted to use a golf cart in NIKE or PGA TOUR events.

FIRST CLAIM FOR RELIEF
Count One
(Public Accommodation Discrimination)

14.

Plaintiff incorporates paragraphs 1 through 13 by reference as if fully set forth herein.

15.

At all times material herein, Defendant is and has been a private entity which is a public accommodation or which owns, leases or operates a place of public accommodation as those terms are used in the ADA, 42 USC § 12181.

16.

By prohibiting the use of a golf cart in NIKE and PGA TOUR events, Defendant has subjected Plaintiff directly or through contractual, licensing or other arrangements to a denial of the opportunity to participate in or benefit from the goods, services, facilities, privileges, advantages or accommodations of an entity.

17.

The use of a golf cart is necessary to provide Plaintiff with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others on the NIKE and PGA TOURS

18.

By prohibiting the use of a golf cart Defendant has directly or through contractual or other arrangements, utilized standards or criteria or methods of administration that have the effect of discriminating on the basis of disability.

19.

By prohibiting the use of a golf cart Defendant has imposed or applied eligibility criteria that screen out or tend

to screen out an individual with a disability from fully and equally enjoying goods, services, facilities, privileges, advantages or accommodations.

20.

Plaintiff has requested that Defendant modify its polices, practices or procedures to permit him to use a golf cart because the use of a golf cart is necessary to afford Plaintiff the benefit of goods, services, facilities, privileges advantages or accommodations. Defendant has failed to make reasonable modifications in its policies, practices or procedures.

21.

Defendant has failed to take such steps as may be necessary to ensure that Plaintiff is not excluded from participation in the NIKE and PGA TOURs because of the absence of auxiliary aids and services.

FIRST CLAIM FOR RELIEF
Count Two
(Professional Advancement)

22.

Plaintiff incorporates paragraphs 1 through 13 by reference as if fully set forth herein.

23.

At all times material herein Defendant PGA TOUR, Inc. is and has been a private entity that offers examinations or courses related to applications, licensing, certification, or credentialing for professional or trade purposes as those terms are used in the ADA, 42 USC § 12189.

24.

The NIKE TOUR constitutes an examination or course related to application, licensing, certification or credentialing for participation in the PGA TOUR and other professional or

trade purposes. By prohibiting the use of a cart in NIKE TOUR events, Defendant has failed to offer the NIKE TOUR in a place and manner accessible to Plaintiff.

FIRST CLAIM FOR RELIEF
Count Three
(Employment Discrimination)

25.

At all times material herein Defendant PGA TOUR, Inc. is and has been a covered entity as that term is used in the ADA, 42 USC 12111(2).

26.

At all times material herein Plaintiff is and has been a qualified individual with a disability as that term is defined in the ADA, 42 USC § 12111(8)

27.

By prohibiting Plaintiff from using a golf cart, Defendant has discriminated against him because of his disability in regard to job application procedures, hiring, advancement, employment compensation, job training and other terms, conditions and privileges of employment. This discrimination includes but is not limited to the following:

a) limiting Plaintiff in a way that adversely affects the opportunities or status of Plaintiff as an applicant or employee because of his disability;

b) participating in a contractual or other arrangement or relationship that has the effect of subjecting Plaintiff to prohibited discrimination;

c) utilizing standards, criteria, or methods of administration that have the effect of discrimination on the basis of disability or that perpetuate the discrimination of others who are subject to common administrative control;

d) not making reasonable accommodations to the known physical limitations of Plaintiff;

e) denying employment opportunities to Plaintiff based on the need to make reasonable accommodation to the physical impairments of Plaintiff;

f) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out Plaintiff;

g) failing to administer tests concerning employment in the most effective manner to ensure that test results accurately reflect the skills, aptitude or other factors that the test purports to measure rather than reflecting the impaired skills of Plaintiff.

FIRST CLAIM FOR RELIEF

RELIEF REQUESTED

28.

Plaintiff is entitled to a preliminary and permanent injunction requiring Defendant to permit him to use a golf cart in the PGA QUALIFYING TOUR, the NIKE TOUR and the PGA TOUR.

29.

Plaintiff is entitled to recover his reasonable attorney fees, including litigation expenses and costs incurred in this action.

WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

1. For preliminary and permanent injunctive relief requiring Defendant to permit Plaintiff to use a golf cart to participate in the PGA TOUR QUALIFYING TOURNAMENT, the PGA TOUR and the NIKE TOUR.

2. For his reasonable costs and attorney fees incurred in this action.

3. For such other and further relief as the Court may deem just and equitable.

DATED this 19 day of December, 1997.

WALTERS ROMM CHANTI &
DICKENS, P.C.

By: /s/ Illegible
Martha Lee Walters, OSB #77315
William Wiswall, OSB #62101
Trial Attorneys Of Attorneys for
Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. 97-6309-TC

CASEY MARTIN,

Plaintiff,

vs.

PGA TOUR, INC., a Maryland corporation,

Defendant.

DEFENDANT'S ANSWER TO PLAINTIFF'S AMENDED COMPLAINT

For its Answer to Plaintiff's Amended Complaint ("Complaint"), Defendant PGA TOUR, Inc., hereby admits, denies and alleges as follows:

1. Defendant admits that the Complaint seeks preliminary and permanent injunctive relief, and costs and attorneys' fees, but Defendant denies that there is any basis for such relief and Defendant further denies that there has been any discrimination on the basis of disability or otherwise.

2. Defendant admits that Plaintiff purports to bring this action under 42 U.S.C. § 12101 *et seq*, but Defendant denies that this action properly arises under those statutes.

3. Defendant denies that this Court has jurisdiction over this claim for the reason that Defendant is not subject to the ADA.

4. Defendant denies that Plaintiff has any basis for preliminary or permanent injunctive relief under the ADA in this action.

5. Defendant denies that Plaintiff is entitled to recover costs and attorneys' fees in this action as alleged or at all.

6. Defendant is without sufficient information to form a belief as to the truth of the allegations of Paragraph 6 of the Complaint, and therefore neither admits nor denies those allegations.

7. Answering Paragraph 7 of the Complaint, Defendant admits that it is a Maryland not-for-profit corporation duly organized under the laws of the State of Maryland, but Defendant denies that it is doing business throughout the United States and denies that it does sufficient business in Oregon to warrant the exercise of personal jurisdiction over Defendant by this Court.

8. Defendant is without sufficient information to form a belief as to the truth of the allegations of Paragraph 8 of the Complaint, and therefore neither admits nor denies those allegations.

9. Defendant admits the allegations of Paragraph 9 of the Complaint.

10. Defendant admits the allegations of Paragraph 10 of the Complaint, except the use of the term "prohibited."

11. Defendant admits the allegations of Paragraph 11 of the Complaint.

12. Defendant admits the allegations of Paragraph 12 of the Complaint.

13. Defendant admits the allegations of the first two sentences of Paragraph 13 of the Complaint, but is without sufficient information to form a belief as to the truth of the remaining allegations of such Paragraph.

14. Answering Paragraph 14 of the Complaint, Defendant incorporates herein each of the admissions, denials and allegations of Paragraphs 1 through 13 above.

15. Answering Paragraph 15 of the Complaint, Defendant admits that it is a private entity, but Defendant denies the remaining allegations of Paragraph 15.

16. Defendant denies the allegations of Paragraph 16 of the Complaint.

17. Defendant denies the allegations of Paragraph 17 of the Complaint.

18. Defendant denies the allegations of Paragraph 18 of the Complaint.

19. Defendant denies the allegations of Paragraph 19 of the Complaint.

20. Answering Paragraph 20 of the Complaint, Defendant admits that Plaintiff has requested that Defendant change its rules and Defendant has refused. Defendant denies the remainder of Paragraph 20.

21. Defendant denies the allegations of Paragraph 21 of the Complaint.

22. Answering Paragraph 22 of the Complaint, Defendant incorporates herein the admissions, denials and allegations of Paragraphs 1 through 21 above.

23. Answering Paragraph 23 of the Complaint, Defendant admits that it is a private entity, but Defendant denies the remaining allegations of Paragraph 23.

24. Defendant denies the allegations of Paragraph 24 of the Complaint.

25. Defendant denies the allegations of Paragraph 25 of the Complaint.

26. Defendant is without sufficient information to form a belief as to the truth of the allegations of Paragraph 26 of the Complaint, and therefore neither admits nor denies such allegations.

27. Defendant denies the allegations of Paragraph 27 of the Complaint, including each of the seven subparts of Paragraph 27 of the Complaint.

28. Defendant denies the allegations of Paragraph 28 of the Complaint.

29. Defendant denies the allegations of Paragraph 29 of the Complaint.

30. For its first affirmative defense, Defendant alleges that Plaintiffs Complaint fails to state a claim upon which relief can be granted.

31. For its second affirmative defense, Defendant alleges that this Court lacks personal jurisdiction and venue over Defendant because Defendant is not present or otherwise found within this District and because none of the events or omissions giving rise to Plaintiff's claim occurred within this District.

32. For its third affirmative defense, Defendant alleges that this Court lacks subject matter jurisdiction because Defendant is not a "public accommodation" within the meaning of the ADA.

33. For its fourth affirmative defense, Defendant alleges that Plaintiff is estopped to assert the claims of its Complaint and has waived any such claims by agreeing to abide by the rules and regulations of PGA TOUR as they relate to the Qualifying Tournament, the NIKE TOUR, and the PGA TOUR itself.

34. For its fifth affirmative defense, Defendant alleges that Plaintiff's claims under the ADA are barred by the fact that the relief sought by Plaintiff would fundamentally alter the nature of the competition which is sponsored by PGA TOUR, including competition on the NIKE TOUR.

35. For its sixth affirmative defense, Defendant alleges that Plaintiffs claims are barred because the relief sought by

Plaintiff would irreparably harm Defendant and because the balance of hardships tips decidedly in favor of Defendant.

DATED this 24 day of December, 1997.

WILLIAM J. MALEDON
SCOTT W. RODGERS
OSBORN MALEDON, P.A.
2929 North Central Avenue
Suite 2100
Phoenix, Arizona 85012-2794

GEORGE J. COOPER
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Attorneys for Defendant PGA TOUR

By /s/ George Cooper

Logo [USGA]

Section II

DEFINITIONS

* * * *

Rule

The term "Rule" includes Local Rules made by the Committee under Rule 33-8a.

* * * *

Section III

THE RULES OF PLAY

THE GAME

Rule 1. The Game

1-1. General

The Game of Golf consists in playing a ball from the teeing ground into the hole by a stroke or successive strokes in accordance with the rules.

1-2. Exerting Influence on Ball

No Player or caddie shall take any action to influence the position or the movement of the a ball except in accordance with the Rules.

PENALTY FOR BREACH OF RULE 1-2:
Match Play—Loss of hole; Stroke play—Two strokes.

Note: In the case of a serious breach of Rule 1-2, the Committee may impose a penalty of disqualification.

1-3. Agreement to Waive Rules

Players shall not agree to exclude the operation of any Rule or to waive any penalty incurred.

* * * *

4-4. Maximum of Fourteen Clubs

a. SELECTION AND REPLACEMENT OF CLUBS

The player shall start a stipulated round with not more than fourteen clubs. He is limited to the clubs thus selected for that round except that, without unduly delaying play, he may:

(i) if he started with fewer than fourteen clubs, add any number provided his total number does not exceed fourteen; and

(ii) replace, with any club, a club which becomes unfit for play in the normal course of play.

The addition or replacement of a club or clubs may not be made by borrowing any club selected for play by any other person playing on the course.

b. PARTNERS MAY SHARE CLUBS

Partners may share clubs, provided that the total number of clubs carried by the partners so sharing does not exceed fourteen.

PENALTY FOR BREACH OF RULE 4-4a or b.
REGARDLESS OF NUMBER OF EXCESS CLUBS CARRIED:

Match play – At the conclusion of the hole at which the breach is discovered, the state of the match shall be adjusted by deducting one hole for each hole at which a breach occurred. Maximum deduction per round: two holes.

Stroke play – Two strokes for each hole at which any breach occurred; maximum penalty per round: four strokes.

Bogey and par competitions- Penalties as in match play.

Stableford competitions- see Note to Rule 32-1b

c. EXCESS CLUB DECLARED OUT OF PLAY

Any club carried or used in breach of this Rule shall be declared out of play by the player immediately upon discovery that a breach has occurred and there after shall not be used by the player during the round.

PENALTY FOR BREACH OF RULE 4-4c: *Disqualification.*

Rule 5. The Ball

5-1. General

The ball the player uses shall conform to requirements specified in Appendix III on maximum weight, minimum size, spherical symmetry, initial velocity and overall distance.

Note: The Committee may require, in the conditions of a competition (Rule 33-1), that the ball the player uses must be named on the current List of Conforming Golf Balls issued by the United States Golf Association.

5-2. Foreign Material

Foreign material must not be applied to a ball for the purpose of changing its playing characteristics.

PENALTY FOR BREACH OF RULE 5-1 or 5-2:
Disqualification.

5-3. Ball Unfit for Play

A ball is unfit for play if it is visibly cut, cracked or out of shape. A ball is not unfit for play solely because mud or other materials adhere to it, its surface is scratched or scraped or its paint is damaged or discolored.

If a player has reason to believe his ball has become unfit for play during the play of the hole being played, he may during the play of such hole lift his ball without penalty to determine whether it is unfit.

Before lifting the ball, the player must announce his intention to his opponent in match play or his marker or a

fellow-competitor in stroke play and mark the position of the ball. He may then lift and examine the ball without cleaning it and must give his opponent, marker or fellow- competitor an opportunity to examine the ball.

If he fails to comply with this procedure, *he shall incur a penalty of one stroke.*

If it is determined that the ball has become unfit for play during play of the hole being played, the player may substitute another ball, placing it on the spot where the original ball lay. Otherwise, the original ball shall be replaced.

* * * *

ADMINISTRATION

Rule 33. The Committee

33-1. Conditions; Waiving Rule

The Committee shall lay down the conditions under which a competition is to be played.

The Committee has no power to waive a Rule of Golf.

Certain special rules governing stroke play are so substantially different from those governing match play that combining the two forms of play is not practicable and is not permitted. The results of matches played and the scores returned in these circumstances shall not be accepted.

In stroke play the Committee may limit a referee's duties.

33-2 The Course

a. DEFINING BOUNDS AND MARGINS

The Committee shall define accurately:

(i) the course and out of bounds,

(ii) the margins of water hazards and lateral water hazards,

(iii) ground under repair, and

(iv) obstructions and integral parts of the course.

b. NEW HOLES

New holes should be made on the day on which a stroke competition begins and at such other times as the Committee considers necessary, provided all competitors in a single round play with each hole cut in the same position.

Exception: When it is impossible for a damaged hole to be repaired so that it conforms with the Definition, the Committee may make a new hole in a nearby similar position.

Note: Where a single round is to be played on more than one day, the Committee may provide in the conditions of a competition that the holes and teeing grounds may be differently situated on each day of the competition, provided that, on any one day, all competitors play with each hole and each teeing ground in the same position.

c. PRACTICE GROUND

Where there is no pratice ground available outside the area of a competition course, the Committee should lay down the area on which players may practice on any day of a competition, if it is practicable to do so. On any day of a stroke competition, the Committee should not normally permit practice on or to a putting green or from a hazard of the competition course.

d. COURSE UNPLAYABLE

If the Committtee or its authorized representative considers that for any reason the course is not in a playable condition or that there are circumstances which render the proper playing of the game impossible, it may, in match play or stroke play, order a temporary suspension of play or, in stroke play, declare play null and void and cancel all scores for the round in question. When play has been temporarily suspended, it shall be resumed from where it was discontinued, even though resumption occurs on a subsequent day. When a round

is cancelled, all penalties incurred in that round are cancelled.

(Procedure in discontinuing play — see Rule 6-8.)

* * * *

33-8. Local Rules

a. POLICY

The Committee may make and publish Local Rules for abnormal conditions if they are consistent with the policy of the Governing Authority for the country concerned as set forth in Appendix I to these Rules.

b. Waiving Penalty

A penalty imposed by a Rule of Golf shall not be waived by a Local Rule.

* * * *

Appendix I

LOCAL RULES; CONDITIONS OF THE COMPETITION

Local Rules

Rule 33-8 provides:

"The Committee may make and publish Local Rules for abnormal conditions if they are consistent with the policy of the Governing Authority for the country concerned as set forth in Appendix I to these Rules.

"A penalty imposed by a Rule of Golf shall not be waived by a Local Rule."

Information regarding acceptable and prohibited Local Rules is provided in the *Decisions on the Rules of Golf* under Rule 33-8. Among the matters for which Local Rules may be advisable are following:

1. Obstructions

Clarifying the status of objects which may be obstructions (Rule 24).

Declaring any construction to be an integral part of the course and, accordingly, not an obstruction, e.g., built-up sides of teeing grounds, putting greens and bunkers (Rules 24 and 33-2a).

2. Roads and Paths

Providing relief of the type afforded under Rule 24-2b from roads and paths not having artificial surfaces and sides if they could unfairly affect play.

3. Preservation of Course

Preservation of the course by defining areas, including turf nurseries and other parts of the course under cultivation, as ground under repair from which play is prohibited.

4. Water Hazards

Lateral Water Hazards. Clarifying the status of sections of water hazards which may be lateral water hazards(Rule 26).

Provisional Ball. Permitting play of a provisional ball for a ball which may be a water hazard of such character that it would be impracticable to determine whether the ball is in the hazard or to do so would unduly delay play. In such case, if a provisional ball is played and the original ball is in a water hazard, the player may play the original ball as it lies or continue the provisional ball in play, but he may not proceed under Rule 26-1.

5. Defining Bounds and Margins

Specifying means used to define out of bounds, hazards, water hazards, lateral water hazards and ground under repair.

6. Ball Drops

Establishment of special areas on which balls may be dropped when it is not feasible or practicable to proceed exactly in conformity with Rule 24-2b (immovable obstructions), Rule 25-1b or 1c (ground under repair), Rule

26-1(water hazards and lateral water hazards) and Rule 28 (ball unplayable).

7. Temporary Conditions—Mud, Extreme Wetness

Temporary conditions which might interfere with proper playing of the game, including mud and extreme wetness warranting lifting an embedded ball anywhere through the green (see detailed recommendation below) or removal of mud from a ball through the green.

* * *

Following are the suggested texts for other Local Rules which are authorized by the USGA:

Lifting an Embedded Ball

Rule 25-2 provides relief without penalty for a ball embedded in its own pitch-mark in any closely mown area through the green.

On the putting green, a ball may be lifted and damage caused by the impact of a ball may be repaired (Rules 16-1b and c).

When permission to lift an embedded ball anywhere through the green would be warranted, the following Local Rule is suggested:

> Anywhere "through the green," a ball which is embedded in its own pitch-mark in the ground, except in loose sand, may be lifted without penalty, cleaned and dropped as near as possible to the spot where it lay but not nearer the hole. (See Rule 20.) The ball when dropped must first strike a part of the course through the green.
>
> ("Through the green" is the whole area of the course except:
>
> a. The teeing ground and putting green of the hole being played;
>
> b. All hazards on the course.)

Exception: A player may not obtain relief under this Rule if it is clearly unreasonable for him to play a stroke because of interference by anything other than the condition covered by this Rule.

Practice Between Holes

When, between the play of two holes, it is desired to prohibit practice putting or chipping on or near the putting green of the hole last played, the following Local Rule is recommended:

> Between the play of two holes, a player shall not play any practice stroke on or near the putting green of the hole last played. (For other practice, see Rules 7 and 33-2c.)

PENALTY FOR BREACH OF LOCAL RULE:

Match play—Loss of next hole; Stroke play–Two strokes at next hole.

Marking Position of Lifted Ball

When it is desired to require a specific means of marking the position of a lifted ball on the putting green, the following Local Rule is recommended:

> Before a ball on the putting green is lifted, its position shall be marked by placing a small coin or some similar object immediately behind the ball; if the ball-marker interferes with another player, it should be moved one or more putterhead-lengths to one side. If the position of the ball is not so marked *the player shall incur a penalty of one stroke* and the ball shall be replaced. If the ball is not replaced, *the player shall incur the penalty* for breach of Rule 20-3a, but no additional penalty under this Local Rule shall be applied. (This modifies Rule 20-1.)

Prohibition Against Touching Line of Putt with Club

When it is desired to prohibit touching the line of putt with a club in moving loose impediments, the following Local Rule is recommended:

> The line of putt shall not be touched with a club for any purpose except to repair old hole plugs or ball marks or during address. (This modifies Rule 16-1a.)

PENALTY FOR BREACH OF LOCAL RULE:

Match play—Loss of hole; Stroke play—Two strokes.

Protection of Young Trees

When it is desired to prevent damage to young trees, the following Local Rule is recommended:

> Protection of young trees indentified by____—If such a tree interferes with a player's stance or the area of his intended swing, the ball must be lifted, without penalty, and dropped in accordance with the procedure prescribed in Rule 24-2b (Immovable Obstruction). If the ball is in a water hazard, the player shall lift and drop the ball in accordance with Rule 24-2b(i) except that the ball must be dropped in the water hazard or the player may proceed under Rule 26-1, if applicable. The ball may be cleaned when so lifted.

Exception: A player may not obtain relief under this Rule if (a) it is clearly unreasonable for him to play a stroke because of interference by anything other than such tree, or (b) interference by such tree would occur only through use of an unnecessarily abnormal stance, swing or direction of play.

Environmentally-Sensitive Areas

When the Committee is required to prohibit play from environmentally-sensitive areas which are on or adjoin the course, the following Local Rule is recommended:

1. Definition

An environmentally-sensitive area is an area so declared by an appropriate authority, entry into and/or play from which is prohibited for environmental reasons. Such an area may be defined as ground under repair, a water hazard, a lateral water hazard or out of bounds at the discretion of the Committee provided that, in the case of an environmentally-sensitive area which has been defined as a water hazard or a lateral water hazard, the area is, by Definition, a water hazard.

Note: The Committee may not declare an area to be environmentally-senstitive.

2. Ball in Environmentally-Sensitive Area

(a) GROUND UNDER REPAIR

If a ball is in an environmentally-sensitive area which is defined as ground under repair, a ball must be dropped in accordance with Rule 25-1b.

If there is reasonable evidence that a ball is lost within an environmentally-sensitive area which is defined as ground under repair, the player may take relief without penalty as prescribed in Rule 25-1c.

(b) WATER HAZARDS AND LATERAL WATER HAZARDS

If a ball is in or there in reasonable evidence that it is lost in an environmentally-sensitive area which is defined as a water hazard or a lateral water hazard, the player must, under penalty of one stroke, proceed under Rule 26-1

Note: If a ball dropped in accordance with Rule 26 rolls into a position where the environmentally-sensitive area interferes with the player's stance or the area of his intended swing, the player must take relief as provided in Clause 3 of this Local Rule.

(c) OUT OF BOUNDS

If a ball is in an environmentally-sensitive area which is defined as out of bounds, the player shall play a ball, under penalty of one stroke, as nearly as possible at the spot from which the original ball was last played (see Rule 20-5).

3. Interference with Stance or Area of Intended Swing

Interference by an environmentally-sensitive area occurs when such a condition interferes with the player's stance or the area of his intended swing. If interference exists, the player must take relief as follows:

(i) Through the Green: If the ball lies through the green, the point on the course nearest to where the ball lies shall be determined which (a) is not nearer the hole, (b) avoids interference by the condition and (c) is not in a hazard or on a putting green. The player shall lift the ball and drop it without penalty within on club-length of the point thus determined on a part of the course which fulfils (a), (b) and (c) above.

(ii) In a Hazard: If the ball is in a hazard, the player shall lift the ball and drop it either:

(a) Without penalty, in the hazard, as near as possible to the spot where the ball lay, but not nearer the hole, on a part of the course which provides complete relief from the condition;

or

(b) Under penalty of one stroke, outside the hazard, keeping the point where the ball lay directly between the hole and the spot on which the ball is dropped, with no limit to how far behind the hazard the ball may be dropped. Additionally, the player may proceed under Rule 26 or 28 if applicable.

(iii) On the putting green: If the ball lies on the putting green, the player shall lift the ball and place it without penalty in the nearest position to where it lay which affords complete relief from the condition, but not nearer the hole or in a hazard.

The ball may be cleaned when so lifted under Clause 3 of this Local Rule.

Exception: A player may not obtain relief under Clause 3 of this Local Rule if (a) it is clearly unreasonable for him to play a stroke because of interference by anything other than a condition covered by this Local Rule or (b) interference by such a condition would occur only through use of an unnecessarily abnormal stance, swing or direction of play.

4. Re-Dropping

If a dropped ball rolls into a position covered by this Local Rule or a position covered by 20-2c, it shall be re-dropped without penalty. If the ball when re-dropped rolls into such a position, it shall be placed as near as possible to the spot where it first struck a part of the course when re-dropped.

Exception: A ball dropped under Clause 2(b) of this local rule shall not be re-dropped if the environmentally-sensitive area interferes with the player's stance or the area of his intended swing. The player must take relief as provided in Clause 3 of this Local Rule.

PENALTY FOR BREACH OF RULE:
Match play—Loss of hole; Stroke play—Two strokes.

Note: In the case of a serious breach of this Local Rule, the Committee may impose a penalty of disqualification.

Temporary Power Lines and Cables

When temporary power lines, cables or telephone lines are installed on the course, the following Local Rule is recommended:

Temporary power lines, cables, telephone lines and mats covering or stanchions supporting them are obstructions:

1. If they are readily movable, Rule 24-1 applies.

2. If they are fixed or not readily movable, the player may, if the ball lies though the green or in a bunker, obtain relief as provided in Rule 24-2b. If the ball lies in a water hazard, the player may obtain relief under Rule 24-2b(i) except that the ball must be dropped in the water hazard.

Note: The Prohibition in Rule 24-2 against crossing over, through or under the obstruction does not apply.

3. If a ball strikes an elevated power line or cable, the stroke shall be cancelled and replayed, without penalty (see Rule 20-5). If the ball is not immediately recoverable another ball may be substituted.

Note: Guy wires supporting a temporary immovable obstruction are part of the temporary immovable obstruction unless the Committee, by Local Rule, declares that they are to be treated as elevated power lines or cables.

Exception: Ball striking elevated junction section of cable rising from the ground shall not be replayed.

4. Grass-covered cable trenches are ground under repair and Rule 25-1b applies.

Temporary Immovable Obstructions

When temporary obstructions are installed on or adjoining the course, the Committee should define the status of such obstructions as either movable, immovable or temporary immovable obstructions. If the Committee defines such obstructions as temporary immovable obstructions, the following Local Rule is recommended:

1. Definition

A temporary immovable obstruction is a non-permanent artificial object which is often erected in conjunction with a competition and which is fixed or not readily movable.

Examples of temporary immovable obstructions include, but are not limited to, tents, scoreboards, grandstands, television towers and lavatories.

Supporting guy wires are part of the temporary immoyable obstruction unless the Committee declares that they are to be treated as elevated power lines or cables.

2. Interference

Interference by a temporary immovable obstruction occurs when (a) the ball lies in front of and so close to the obstruction that the obstruction interferes with the player's stance or the area of his intended swing, or (b) the ball lies in, on, under or behind the obstruction so that any part of the obstruction intervenes directly between the player's ball and the hole; interference also exists if the ball lies within one club-length of a spot where such intervention would exist.

Note: A ball is under a temporary immovable obstruction when it is below the outer most edges of the obstruction, even if these edges do not extend downwards to the ground.

3. Relief

A player may obtain relief from interference by a temporary immovable obstruction, including a temporary immovable obstruction which is out of bounds, as follows:

a. THROUGH THE GREEN

If the ball lies through the green, the point on the course nearest to where the ball lies shall be determined which (a) is not nearer the hole, (b) avoids interference as defined in Clause 2 and (c) is not in a hazard or on a putting green. The

player shall lift the ball and drop it without penalty within one club-length of the point thus determined on a part of the course which fulfils (a), (b) and (c) above.

b. IN A HAZARD

If the ball is in a hazard, the player shall lift and drop the ball either:

(i) Without penalty, in the hazard, on the nearest part of the course affording complete relief within the limits specified in Clause 3a above or, if complete relief is impossible, on a part of the course within the hazard which affords maximum available relief; or

(ii) *Under penalty of one stroke,* outside the hazard as follows: the point of the course nearest to where the ball lies shall be determined which (a) is not nearer the hole, (b) avoids interference as defined in Clause 2 and (c) is not in a hazard. The player shall drop the ball within one club-length of the point thus determined on a part of the course which fulfils (a), (b) and (c) above.

Note: If the ball lies in a hazard, nothing in this Local Rule precludes the player from proceeding under Rule 26 or Rule 28, if applicable.

The ball may be cleaned when lifted under Clause 3.

Exceptions: A player may not obtain relief under Clause 3 if:

1. It is clearly unreasonable for him to play a stroke or, in the care of intervention, to play a stroke directly towards the hole, because of interference by anything other then the temporary immovable obstruction;

2. Interference by the temporary immovable obstruction would occur only through use of an unneccessarily abnormal stance, swing or direction of play; or

3. In the case of intervention, it would be clearly unreasonable to expect the player to be able to strike the ball far enough towards the hole to reach the temporary immovable obstruction.

Note: A Committee may make a Local Rule (a) permitting or requiring a player to use a dropping zone or ball drop when taking relief from a temporary immovable obstruction or (b) permitting a player, as an additional relief option, to drop the ball on the opposite side of the obstruction from the point established under Clause 3, but otherwise in accordance with Clause 3.

4. Ball Lost

If there is reasonable evidence that the ball is lost in, on or under a temporary immovable obstruction, a ball may be dropped under the provisions of Clause 3 or Clause 5, if applicable. For the purpose of applying Clauses 3 and 5, the ball shall be deemed to lie at the spot where it entered the obstruction (Rule 24-2c).

5. Dropping Zones (Ball Drops)

If the player has interference from a temporary immovable obstruction, the Committee may permit or require the use of a dropping zone or ball drop. If the player uses a dropping zone in taking relief, he must drop the ball in the dropping zone nearest to which his ball originally lay or is deemed to lie under Clause 4 (even thought the nearest dropping zone may be nearer the hole).

Note: A Committee may make a Local Rule prohibiting the use of a dropping zone or ball drop which is nearer the hole.

6. Re-Dropping

If a dropped ball rolls into a position covered by this Local Rule or a position covered by Rule 20-2c, it shall * * * *

* * * *

UPPER HALF	LOWER HALF	UPPER HALF	LOWER HALF
64 QUALIFIERS		32 QUALIFIERS	
1 vs. 64	2 vs. 63	1 vs. 32	2 vs. 31
32 vs. 33	31 vs. 34	16 vs. 17	15 vs. 18
16 vs. 49	15 vs. 50	8 vs. 25	7 vs. 26
17 vs. 48	18 vs. 47	9 vs. 24	10 vs. 23
8 vs. 57	7 vs. 58	4 vs. 29	3 vs. 30
25 vs. 40	26 vs. 39	13 vs. 20	14 vs. 19
9 vs. 56	10 vs. 55	5 vs. 28	6 vs. 27
24 vs. 41	23 vs. 42	12 vs. 21	11 vs. 22
4 vs. 61	3 vs. 62	16 QUALIFIERS	
29 vs. 36	30 vs. 35	1 vs. 16	2 vs. 15
13 vs. 52	14 vs. 51	8 vs. 9	7 vs. 10
20 vs. 45	19 vs. 46	4 vs. 13	3 vs. 14
5 vs. 60	6 vs. 59	5 vs. 12	6 vs. 11
28 vs. 37	27 vs. 38	8 QUALIFIERS	
12 vs. 53	11 vs. 54	1 vs. 8	2 vs. 7
21 vs. 44	22 vs. 43	4 vs. 5	3 vs. 6

Handicap Allowances

The USGA recommends the following handicap allowances in handicap competitions:

Singles match play: Allow the higher-handicapped player the full difference between the handicaps of the two players.

Four-ball match play: Reduce the handicaps of all four players by the handicap of the low-handicapped player, who shall then play from scratch. Allow each of the three other players 100 percent of the resulting difference.

Individual stroke play: Allow the full handicap.

Four-ball stroke play: Men —Allow each competitor 90 percent of his handicap. Women—Allow each competitor 95 percent of her handicap.

Best-ball-of-four; stroke play: Men—Allow each competitor 80 percent of his handicap. Women—Allow each competitor 90 percent of her handicap.

Optional Conditions

The following are some conditions which a Committee may wish to make:

List of Conforming Golf Balls

The USGA periodically issues a List of Conforming Golf Balls. If it is desired to require use of a brand of golf ball on the List, the List should be posted and the following issued as a condition of the competition:

> Only brands of golf balls on the USGA's latest List of Conforming Golf Balls may be used. Penalty for use of brand not on the List: Disqualification.

One Ball Rule

If it is desired to prohibit changing brands of golf balls during a stipulated round, the following condition is recommended; it is suggested that it be considered only for competitions involving expert players:

Limitation on Golf Balls Used During Round

(Condition: Rules 5-1 and 33-1)

1. BALLS WITH IDENTICAL MARKINGS TO BE USED

During a stipulated round, the balls a player uses must be of the same brand and type as detailed by a single entry on the current list of Conforming Golf Balls.

PENALTY FOR BREACH OF CONDITION:

Match play—At the conclusion of the hole at which the breach is discovered, the state of the match shall be adjusted by deducting one hole for each hole at which a breach occurred. Maximum deduction per round: two holes. Stroke play — Two strokes for each hole at which any breach occurred; maximum penalty per round: four strokes.

2. PROCEDURE WHEN BREACH DISCOVERED

When a player discovers that he has used a ball in breach of this condition, he shall abandon that ball before playing from the next teeing ground and complete the round using a proper ball; otherwise, *the player shall be disqualified*. If discovery is made during play of a hole and the player elects to substitute a proper ball before completing that hole, the player shall place a proper ball on the spot where the ball used in breach of this condition lay.

Time of starting

If the Committee desires to adopt the condition in the Note under Rule 6-3a, the following wording is recommended:

> Rule 6-3a provides, "The player shall start at the time laid down by the Committee." The penalty for breach of Rule 6-3a is disqualification. However, it is a condition of the competition that, if the player arrives at his starting point, ready to play, within five minutes after his starting time, in the absence of circumstances which warrant waiving the penalty of disqualification as provided in Rule 33-7, the penalty for failure to start on

time is loss of the first hole in match play or two strokes at the first hole in stroke play instead of disqualification.

Discontinuance of Play; Protection of Persons Against Lightning

As there have been many deaths and injuries from lightning on golf courses, all clubs and sponsors of golf competitions are urged to take precaution for the protection of persons against lighting. Attention is called to Rules 6-8 and 33-2d. If the Committee desires to adopt the condition in the Note under Rule 6-8b, the following wording is recommended:

> Rule 6-8b details the procedure for discontinuance of play. The penalty for a breach of Rule 6-8b is disqualification. However, it is a condition of competition that, in potentially dangerous situations, play shall be discontinued immediately following a suspension of play by the Committee. If a player fails to discontinue play immediately, he shall be disqualified unless circumstances warrant waiving such penalty as provided in Rule 33-7. An immediate suspension of play will be signalled by a prolonged note of the siren.

The USGA suggests that players be informed that they have the right to stop play if they think lightning threatens them, even though the Committee may not have specifically authorized it by signal.

The USGA generally uses the following signals and recommends that all Committees do similarly:

Discontinue Play Immediately: One prolonged note of siren.

Discontinue Play: Three consecutive notes of siren, repeated.

Resume Play: Two short notes of siren, repeated.

Practice

The Committee may make regulations governing practice in accordance with the Note to Rule 7-1, Clause (c) of the Exception under Rule 7-2 and Rule 33-2c.

Advice in Team Competitions

If the Committee desires to adopt the condition in the Note under Rule 8, which applies to a team competition with or without concurrent individual competition, the following wording is recommended:

> In accordance with the Note to Rule 8 of the Rules of Golf, each team may appoint one person (in addition to the persons from whom advice may be asked under Rule 8-1) who may give advice (including pointing out a line for putting) to members of that team. Such person [if it is desired to put a restriction on who may be appointed and/ or permissible conduct of that person, insert such restriction here] shall be identified to the Committee before giving advice.

Transportation

If it is desired to require players to walk in a competition, the following condition is suggested:

Players shall walk at all times during a stipulated round.

PENALTY FOR BREACH OF CONDITION:

. Match play—At the conclusion of the hole at which the breach is discovered, the state of the match shall be adjusted by deducting one hole for each hole at which a breach occurred. Maximum deduction per round : two holes.

Stroke play—Two strokes for each hole at which any breach occurred; Maximum penalty per round: four strokes. In the event of a breach between the play of two holes, the penalty applies to the next hole.

Match or stroke play—Use of any unauthorized form of transportation shall be discontinued immediately upon discovery that a breach has occurred. Otherwise, the player shall be disqualified.

* * * *

Conditions of the Competition

Rule 33-1 states: "The Committee shall lay down the conditions under which a competition is to be played." Conditions should include such matters as method of entry, eligibility requirements, format, the method of deciding ties, the method of determining the draw for match play and handicap allowances for a handicap competition

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EDITOR'S NOTE

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CONDITIONS OF COMPETITION AND LOCAL RULES

The Rules of the United States Golf Association govern play, as modified by the PGA TOUR. See applicable competition's "Notice to Competitors (Players)" for additional Definitions, Local Rules and Conditions. Complete text of Rules and Appendix I may be found in the current Rules of Golf.

Unless otherwise noted, the penalty for a breach of a Local Rule or Condition is:

Match play—Loss of Hole; Stroke Play—Two Strokes

Section A - Conditions of Competition

1. **List of Conforming Golf Balls—Appendix I**
Only brands of golf balls on the USGA's current List of Conforming Golf Balls may be used. Penalty for use of brand not on the List: Disqualification.

2. **Limitation on Golf Balls Used During Round (One-Ball Rule Except for Amateur Players in Pro-Am)—Appendix I, Rules 5-1 and 33-1**

a. Balls With Identical Markings To Be Used
During a stipulated round, the balls a player uses must be of the same brand and type as detailed by a single entry on USGA's current list of Conforming Golf Balls. Penalty for Breach of Condition:

Match play—At the conclusion of the hole at which the breach is discovered, the state of the match shall be adjusted by deducting one hole for each hole at which a breach occurred. Maximum deduction per round: two holes.

Stroke play—Two strokes for each hole at which any breach occurred; maximum penalty per round: four strokes.

b. Procedure When Breach Discovered
When a player discovers that he has used a ball in breach of this condition, he shall abandon that ball before playing from the next teeing ground and complete the round using a proper ball; otherwise, the player shall be disqualified. If discovery is made during play of a hole and the player elects to substitute a proper ball before completing that hole, the player shall place a proper ball on the spot where the ball used in breach of this condition lay.

3. **Time of Starting—Note Under Rule 6-3 and Appendix I**
If a player arrives at his starting point, ready to play, within five minutes after his starting time, in the absence of circumstances which warrant waiving the penalty of disqualification as provided in Rule 33-7, the penalty for failure to start on time is loss of the first hole in match play or two strokes at the first hole in stroke play instead of disqualification.

4. **Slow Play—Note 2 Under Rule 6-7**
See posted PGA TOUR Pace of Play Guidelines and Slow Play Fines and Penalties.

5. **Suspension of Play Due to a Dangerous Situation—Note Under Rule 6-8b**
In potentially dangerous situations, play shall be discontinued immediately following a suspension of play by the Committee. If a player fails to discontinue play immediately, he shall be disqualified unless circumstances warrant waiving such penalty as provided in Rule 33-7.

Note: A suspension for a dangerous situation shall be signaled by one prolonged air horn (or siren) note. All other types of suspension shall be signalled by several consecutive, short air horn (or siren) notes. Resumption of play shall be signalled by two consecutive, short air horn (or siren) notes.

All practice areas shall be closed during such suspension until the PGA TOUR Rules Committee has declared them open. Players who disregard such closings shall be subject to disciplinary action.

6. **Transportation—Appendix I**
Players shall walk at all times during a stipulated round unless permitted to ride by the PGA TOUR Rules Committee. Penalty for Breach of Condition:

Match play—At the conclusion of the hole at which the breach is discovered, the state of the match shall be adjusted by deducting one hole for each hole at which a breach occurred. Maximum deduction per round: two holes.

Stroke play—Two strokes for each hole at which any breach occurred; maximum penalty per round: four strokes. In the event of a breach between the play of two holes, the penalty applies to the next hole.

Match or stroke play—Use of any unauthorized form of transportation shall be discontinued immediately upon discovery that a breach has occurred. Otherwise, the player shall be disqualified.

7. **Close of Competition**
The competition shall be deemed to have closed when all scores have been posted on the official scoreboard and approved by the PGA TOUR Rules Committee.

Section B - Local Rules

1. **Out of Bounds—Rule 27**

a. When white stakes or fences are used, the out of bounds line is determined by the nearest inside points of the stakes or fence posts at ground level, excluding angled supports.
b. When a white line is used, the line itself is out of bounds.
c. A ball that crosses the inside edge of a road or curb defined as out of bounds and comes to rest beyond the road or curb is out of bounds, even though it may be on another part of the course.

2. **Water and Lateral Water Hazards Stakes and Lines—Rule 26**
When both stakes and lines are used to define water and lateral water hazards, stakes identify hazards and lines define margins.

Water hazards are defined by yellow stakes or yellow lines.
Lateral water hazards are defined by red stakes or red lines.

3. **Ground Under Repair—Rule 25**
Defined by white lines and includes areas marked as gallery crosswalks. Fire-ant hills, french drains, and grass covered cable trenches are deemed to be ground under repair even though unmarked.

4. **Embedded Ball Through the Green—Appendix I**
Anywhere "through the green," a ball which is embedded in its own pitch-mark in the ground, except in loose sand, may be lifted without penalty, cleaned and dropped as near as possible to the spot where it lay but not nearer the hole. (See Rule 20.) The ball when dropped must first strike a part of the course through the green.

("Through the green" is the whole area of the course except:
a. The teeing ground and putting green of the hole being played;
b. All hazards on the course.)

Exception: A player may not obtain relief under this Rule if it is clearly unreasonable for him to play a stroke because of interference by anything other than the condition covered by this Rule.

5. **Immovable Obstructions—Rule 24-2**
White-lined areas tying into artificially surfaced roads, paths or obstructions are declared to have the same status as the road, path or obstructions and are not ground under repair.

6. **Integral Parts of the Course**
Includes (a) wrappings, wires and cables when closely attached to objects and (b) artificial walls and pilings when located within water hazards or within and/or around bunkers.

7. **Permanent Elevated Power Lines or Cables**
If a ball strikes such power line or cable, the player must disregard that stroke, abandon the ball and play another ball in accordance with Rule 20-5 (for temporary power lines or cables, see item #11).

8. **Touching Line of Putt—Appendix I**
The line of putt shall not be touched with a club for any purpose except to repair old hole plugs or ball marks or during address. (This modifies Rule 16-1a.)

9. **Practice—Note 2 Under Rule 7-2 and Appendix I**
Between the play of two holes, a player shall not play any practice stroke on or near the putting green of the hole last played. (For other practice, see Rules 7 and 33-2c.)

The Local Rule above does not apply if the stipulated round is a pro-am that does not count in the official competition or in any match play competition.

During suspension of play, practice is permitted only on areas specifically designated by the PGA TOUR Rules Committee.

10. **Temporary Obstructions—Appendix I**
(Includes anything installed for the competition). White-lined areas alongside or tying into temporary obstructions are declared to have the same status as the obstructions.

1. **Definition**
A temporary immovable obstruction is a non-permanent artificial object which is often erected in conjunction with a competition and which is fixed or not readily movable.

Examples of temporary immovable obstructions include, but are not limited to, tents, scoreboards, grandstands, television towers and lavatories.

Supporting guy wires are part of the temporary immovable obstruction unless the Committee declares that they are to be treated as elevated power lines or cables.

Note: A temporary movable obstruction is a non-permanent artificial object often erected in conjunction with a competition and which is not fixed or may be moved.

Examples of temporary movable obstructions include, but are not limited to, gallery stakes and ropes, hole indicator signs, equipment for photography, press, radio, scoring or television (see Rule 24-1).

2. **Interference**
Interference by a temporary immovable obstruction occurs when (a) the ball lies in front of and so close to the obstruction that the obstruction interferes with the player's stance or the area of his intended swing, or (b) the ball lies in, on, under or behind the obstruction so that any part of the obstruction intervenes directly between the player's ball and hole; interference also exists if the ball lies within one club-length of a spot where such intervention would exist.

Note: A ball is under a temporary immovable obstruction when it is below the outer most edges of the obstruction, even if these edges do not extend downwards to the ground.

3. **Relief**
A player may obtain relief from interference by a temporary immovable obstruction, including a temporary immovable obstruction which is out of bounds, as follows:

a. **Through the Green**
If the ball lies through the green, the point on the course nearest to where the ball lies shall be determined which (a) is not nearer the hole, (b) avoids interference as defined in Clause 2 and (c) is not in a hazard or on a putting green. The player shall lift the ball and drop it without penalty within one club-length of the point thus determined on a part of the course which fulfills (a), (b) and (c) above.

b. **In a Hazard**
If the ball is in a hazard, the player shall lift and drop the ball either:

(i) Without penalty, in the hazard, as near as possible to the spot where the ball lay, but not nearer the hole, on a part of the course which affords maximum available relief from interference as defined in Clause 2; or

(ii) Under penalty of one stroke, outside the hazard as follows: the point on the course nearest to where the ball lies shall be determined which (a) is not nearer the hole, (b) avoids interference as defined in Clause 2 and (c) is not in a hazard. The player shall drop the ball within one club-length of the point thus determined on a part of the course which fulfills (a), (b) and (c) above.

Note: If the ball lies in a hazard, nothing in this Local Rule precludes the player from proceeding under Rule 26 or Rule 28, if applicable.

The ball may be cleaned when lifted under Clause 3.

Exceptions:
A player may not obtain relief under Clause 3 if:

1. It is clearly unreasonable for him to play a stroke or, in the case of intervention, to play a stroke directly towards the hole, because of interference by anything other than the temporary immovable obstruction;

2. Interference by the temporary immovable obstruction would occur only through use of an unnecessarily abnormal stance, swing or direction of play; or

3. In the case of intervention, it would be clearly unreasonable to expect the player to be able to strike the ball far enough towards the hole to reach the temporary immovable obstruction.

Note: A Committee may make a Local Rule (a) permitting or requiring a player to use a dropping zone (ball drop) when taking relief from a temporary immovable obstruction or (b) permitting a player, as an additional relief option, to drop the ball on the opposite side of the obstruction from the point established under Clause 3, but otherwise in accordance with Clause 3.

4. **Ball Lost**
If there is reasonable evidence that the ball is lost in, on or under a temporary immovable obstruction, a ball may be dropped under the provisions of Clause 3 or Clause 5, if applicable. For the purpose of applying Clause 3 and 5, the ball shall be deemed to lie at the spot where it entered the obstruction (Rule 24-2c).

5. **Dropping Zones (Ball Drops)**
If the player has interference from a temporary immovable obstruction, the Committee may permit or require the use of a dropping zone (ball drop). If the player uses a dropping zone (ball drop) in taking relief, he must drop the ball in the dropping zone (ball drop) nearest to where his ball originally lay or is deemed to lie under Clause 4 (even though the nearest dropping zone (ball drop) may be nearer the hole).

Note: A Committee may make a Local Rule prohibiting the use of a dropping zone (ball drop) that is nearer the hole.

6. **Re-Dropping**
If a dropped ball rolls into a position covered by this Local Rule or a position covered by Rule 20-2c, it shall be re-dropped without penalty. If the ball when re-dropped rolls into such a position, it shall be placed as near as possible to the spot where it first struck a part of the course when re-dropped.

Note: If the ball is dropped in a dropping zone (ball drop), the ball shall not be re-dropped if it comes to rest within two club-lengths of the spot where it first struck a part of the course even though it may come to rest nearer the hole or outside the boundaries of the dropping zone (ball drop).

11. **Temporary Power Lines or Cables**
Temporary power lines, cables, telephone lines and mats covering or stanchions supporting them are obstructions:

1. If they are readily movable, Rule 24-1 applies.

2. If they are fixed or not readily movable, the player may, if the ball lies through the green or in a bunker, obtain relief as provided in Rule 24-2b. If the ball lies in a water hazard, the player may obtain relief under Rule 24-2b(i) except that the ball must be dropped in the water hazard.

Note: The prohibition in Rule 24-2 against crossing over, through or under the obstruction does not apply.

3. If a ball strikes an elevated power line or cable, the stroke shall be canceled and replayed, without penalty (see Rule 20-5). If the ball is not immediately recoverable another ball may be substituted.

Note: Guy wires supporting a temporary immovable obstruction are part of the temporary immovable obstruction unless the Committee, by Local Rule, declares that they are to be treated as elevated power lines or cables.

Exception: Ball striking elevated junction section of cable rising from the ground shall not be replayed.

4. Grass-covered cable trenches are ground under repair and Rule 25-1b applies.

The following Conditions and Local Rules apply in U.S. PGA TOUR cosponsored tournaments ONLY

Marking Position of Lifted Ball—Appendix I
Before a ball on the putting green is lifted, its position shall be marked by placing a small coin or some similar object immediately behind the ball; if the ball-marker interferes with another player, it should be moved one or more putterhead-lengths to one side. If the position of the ball is not so marked, the player shall incur a penalty of one stroke and the ball shall be replaced. If the ball is not replaced, the player shall incur the penalty for breach of Rule 20-3a, but no additional penalty under this Local Rule shall be applied. (This modifies Rule 20-1.)

Turf Plugs on Putting Greens
Turf plugs on putting green are deemed to have the same status as hole plugs and thus may be repaired as prescribed in Rule 16-1c.

Pro-Am Competition—Amateur Players
During a separate pro-am round, if unable to score better than (net) par on a hole, amateur players are required to discontinue play on that hole.

Pro-Am Competition—Score Card
The professional player is responsible for recording scores on the score card of his team. The amateur player's gross score shall be entered when used as the team's best ball. The score card shall be signed by the professional player and attested by one of his amateur partners. Penalties for breach(es) shall be in accordance with the Rules of Golf, but apply only to the professional player.

PGA TOUR RULES COMMITTEE

Tournament Officials
George Bozell / Jon Brendle / Frank Kavanaugh / Vaughn Moise
Mark Russell / Glenn Tait / Slugger White

Tournament Supervisor
Wade Cagle

Senior Director of Rules
Mike Shea

Tournament Directors
Arvin Gine / Ben Nelson

NIKE TOUR
CONDITIONS OF COMPETITION AND LOCAL RULES

The Rules of the United States Golf Association govern play, as modified by the NIKE TOUR. See applicable competition's "Notice to Competitors (Players)" for additional Definitions, Local Rules and Conditions. Complete text of Rules and Appendix I may be found in the current Rules of Golf.

Unless otherwise noted, the penalty for breach of a Local Rule or Condition is:

Match Play - Loss of Hole; Stroke Play - Two Strokes

Section A - Conditions of Competition

1. List of Conforming Golf Balls - Appendix I
Only brands of golf balls on the USGA's current List of Conforming Golf Balls may be used. Penalty for use of brand not on the List: Disqualification.

3. Limitation on Golf Balls Used During Round (One-Ball Rule Except for Amateur Players in Pro-Am) - Appendix I, Rules 5-1 and 33-1

a. Balls With Identical Markings To Be Used
During a stipulated round, the balls a player uses must be of the same brand and type as detailed by a single entry on the USGA's current list of Conforming Golf Balls. Penalty for Breach of Condition:

Match Play - At the conclusion of the hole at which the breach is discovered, the state of the match shall be adjusted by deducting one hole for each hole at which a breach occurred. Maximum deduction per round: two holes.

Stroke Play - Two strokes for each hole at which any breach occurred; maximum penalty per round: four strokes.

b. Procedure When Breach Discovered
When a player discovers that he has used a ball in breach of this condition, he shall abandon that ball before playing from the next teeing ground and complete the round using a proper ball; otherwise, the player shall be disqualified. If discovery is made during play of a hole and the player elects to substitute a proper ball before completing that hole, the player shall place a proper ball on the spot where the ball used in breach of this condition lay.

3. Time of Starting - Note under Rule 6-3 and Appendix I
If a player arrives at his starting point, ready to play, within five minutes after his starting time, in the absence of circumstances which warrant waiving the penalty of disqualification as provided in Rule 33-7, the penalty for failure to start on time is loss of the first hole in match play or two strokes at the first hole in stroke play instead of disqualification.

4. Slow Play - Note 2 under Rule 6-7
See posted NIKE TOUR Pace of Play Guidelines and Slow Play Fines and Penalties.

5. Suspension of Play Due to a Dangerous Situation - Note under Rule 6-8b
In potentially dangerous situations, play shall be discontinued immediately following a suspension of play by the Committee. If a player fails to discontinue play immediately, he shall be disqualified, unless circumstances warrant waiving such penalty as provided in Rule 33-7.
Note: A suspension for a dangerous situation shall be signaled by one prolonged air horn (or siren) note. All other types of suspension shall be signaled by several consecutive, short air horn (or siren) notes. Resumption of play shall be signaled by two consecutive, short air horn (or siren) notes.

All practice areas shall be closed during such suspension until the NIKE TOUR Rules Committee has declared them open. Players who disregard such closing shall be subject to disciplinary action.

6. Transportation - Appendix I
Players shall walk at all times during a stipulated round, unless permitted to ride by the NIKE TOUR Rules Committee.
Penalty of Breach of Condition:

Match Play - At the conclusion of the hole at which a breach is discovered, the state of the match shall be adjusted by deducting one hole for each hole at which a breach occurred. Maximum deduction per round: two holes.

Stroke Play - Two strokes for each hole at which any breach occurred; maximum penalty per round: four strokes. In the event of a breach between the play of two holes, the penalty applies to the next hole.

Match or stroke play - Use of any unauthorized form of transportation shall be discontinued immediately upon discovery that a breach has occurred. Otherwise, the player shall be disqualified.

7. Close of Competition
The competition shall be deemed to have closed when all scores have been posted on the official scoreboard and approved by the NIKE TOUR Rules Committee.

Section B - Local Rules

1. Out of Bounds - Rule 27
a. When white stakes or fences are used, the out of bounds line is determined by the nearest inside points of the stakes or fence posts at ground level, excluding angled supports.
b. When a white line is used, the line itself is out of bounds.
c. A ball that crosses the inside edge of a road or curb defined as out of bounds, and comes to rest beyond the road or curb is out of bounds, even though it may be on another part of the course.

3. Water and Later Water Hazards Stakes and Lines - Rule 26
When both stakes and lines are used to define water and later water hazards, stakes identify hazards and lines define margins.

Water hazards are defined by yellow stakes or yellow lines.
Later water hazards are defined by red stakes or red lines.

3. Ground Under Repair - Rule 25
Defined by white lines and includes areas marked as gallery crosswalks. Fire-ant hills, french drains, and grass covered cable trenches are deemed to be ground under repair even though unmarked.

4. Embedded Ball Through the Green - Appendix I
Anywhere "through the green," a ball which is embedded in its own pitch-mark in the ground, except in loose sand, may be lifted without penalty, cleaned and dropped as near as possible to the spot where it lay but not nearer the hole. (See Rule 20.) The ball when dropped must first strike a part of the course through the green.

("Through the green" is the whole area of the course except:
a. The teeing ground and the putting green of the hole being played;
b. All hazards on the course.)
Exception: A player may not obtain relief under this Rule if it is clearly unreasonable for him to play a stroke because of interference by anything other than the condition covered by this Rule.

5. Immovable Obstructions - Rule 24-3
White lined areas tying into artificially surfaced roads, paths or obstructions are declared to have the same status as the road, path or obstructions and are not ground under repair.

6. Integral Parts of the Course
Includes (a) wrappings, wires and cables when closely attached to objects and (b) artificial walls and pilings when located within water hazards or within and/or around bunkers.

7. Permanent Elevated Power Lines or Cables
If a ball strikes such power line or cable, the player must disregard that stroke, abandon the ball and play another ball in accordance with Rule 20-5 (for temporary power lines or cables -see item #11).

8. Touching Line of Putt - Appendix I
The line of putt shall not be touched with a club for any purpose except to repair old hole plugs or ball marks, or during address. (This modifies Rule 16-1a.)

9. Practice - Note 3 under Rule 7-3 and Appendix I
Between the play of two holes, a player shall not play any practice stroke on or near the putting green of the hole last played. (For other practice, see Rules 7 and 33-3c.)

The Local Rule above does not apply if the stipulated round is a pro-am and the round does not count in the official competition or is any match play competition.

During suspension of play, practice is permitted only on areas specifically designated by the NIKE TOUR Rules Committee.

10. Temporary Obstructions - Appendix I
(Includes anything installed for the competition). White-lined areas alongside or tying into temporary immovable obstructions are declared to have the same status as the obstructions.

1. Definition
A temporary immovable obstructions is a non-permanent artificial object which is often erected in conjunction with a competition and which is fixed or not readily movable.

Examples of temporary immovable obstructions include, but are not limited to, tents, scoreboards, grandstands, television towers and lavatories.

Supporting guy wires are part of the temporary immovable obstruction unless the Committee declares that they are to be treated as elevated power lines or cables.

Note: A temporary movable obstruction is a non-permanent artificial object often erected in

conjunction with a competition and which is not fixed or maybe moved.

Examples of temporary movable obstructions include, but are not limited to, gallery stakes and ropes, hole indicator signs, equipment for photography, press, radio, scoring or television (see Rule 34-1).

2. **Interference**
Interference by a temporary immovable obstruction occurs when (a) the ball lies in front of and so close to the obstruction that the obstruction interferes with the player's stance or the area of his intended swing, or (b) the ball lies in, on, under or behind the obstruction so that any part of the obstruction intervenes directly between the player's ball and the hole; interference also exists if the ball lies within one club-length of a spot where such intervention would exist.

Note: A ball is under a temporary immovable obstruction when it is below the outer most edges of the obstruction, even if these edges do not extend downwards to the ground.

3. **Relief**
A player may obtain relief from interference by a temporary immovable obstruction, including a temporary immovable obstruction which is out of bounds, as follows:

a. **Through the Green**
If the ball lies through the green, the point on the course nearest to where the ball lies shall be determined which (a) is not nearer the hole, (b) avoids interference as defined in Clause 2 and (c) is not in a hazard or on a putting green. The player shall lift the ball and drop it without penalty within one club-length of the point thus determined on a part of the course which fulfills (a), (b) and (c) above.

b. **In a Hazard**
If the ball is in a hazard, the player shall lift and drop the ball either:

(i) Without penalty, in the hazard, on the nearest part of the course affording complete relief within the limits specified in Clause 3a above or, if complete relief is impossible, on a part of the course within the hazard which affords maximum available relief; or

(ii) Under penalty of 1 stroke, outside the hazard as follows: the point on the course nearest to where the ball lies shall be determined which (a) is not nearer the hole, (b) avoids interference as defined in Clause 2 and (c) is not in a hazard. The player shall drop the ball within one club-length of the point thus determined on a part of the course which fulfills (a), (b) and (c) above.

Note: If the ball lies in a hazard, nothing in this Local Rule precludes the player from proceeding under Rule 26 or Rule 28, if applicable.

The ball may be cleaned when lifted under Clause 3.

Exceptions:
A player may not obtain relief under Clause 3 if:

1. It is clearly unreasonable for him to play a stroke or, in the case of intervention, to play a stroke directly towards the hole, because of interference by anything other than the temporary immovable obstruction.

2. Interference by the temporary immovable obstruction would occur only through use of an unnecessarily abnormal stance, swing or direction of play; or

3. In the case of intervention, it would be clearly unreasonable to expect the player to be able to strike the ball far enough towards the hole to reach the temporary immovable obstruction.

Note: A Committee may make a Local Rule (a) permitting or requiring a player to use a dropping zone (ball drop) when taking relief from a temporary immovable obstruction or (b) permitting a player, as an additional relief option, to drop the ball on the opposite side of the obstruction from the point established under Clause 3, but otherwise in accordance with Clause 3.

4. **Ball Lost**
If there is reasonable evidence that the ball is lost in, on or under a temporary immovable obstruction, a ball may be dropped under the provisions of Clause 3 or Clause 5, if applicable. For the purpose of applying Clause 3 and 5, the ball shall be deemed to lie at the spot where it entered the obstruction (Rule 24-3c).

5. **Dropping Zones (Ball Drops)**
If the player has interference from a temporary immovable obstruction, the Committee may permit or require the use of a dropping zone (ball drop). If the player uses a dropping zone (ball drop) in taking relief, he must drop the ball in the dropping zone (ball drop) nearest to which the ball originally lay or is deemed to lie under Clause 4 (even though the nearest dropping zone (ball drop) may be nearer the hole).

Note: A Committee may make a Local Rule prohibiting the use of a dropping zone (ball drop) that is nearer the hole.

6. **Re-Dropping**
If a dropped ball rolls into a position covered by this Local Rule or a position covered by Rule 20-2c, it shall be re-dropped without penalty. If the ball when re-dropped rolls into such a position, it shall be placed as near as possible to the spot where it first struck a part of the course when re-dropped.

Note: If the ball is dropped in a dropping zone (Ball Drop), the ball shall not be re-dropped if it comes to rest within two club-lengths of the spot where it first struck a part of the course even though it may come to rest nearer the hole or outside the boundaries of the dropping zone (Ball Drop).

11. **Temporary Power Lines or Cables**
Temporary power lines, cables, telephone lines and mats covering or stanchions supporting them are obstructions.

1. If they are readily movable, Rule 24-1 applies.

2. If they are fixed or not readily movable, the player may, if the ball lies through the green or in a bunker, obtain relief as provided in Rule 24-2b. If the ball lies in a water hazard, the player may obtain relief under Rule 24-3b (i) except that the ball must be dropped in the water hazard.

Note: The prohibition in Rule 24-3 against crossing over, through or under the obstruction does not apply.

3. If a ball strikes an elevated power line or cable, the stroke shall be canceled and replayed, without penalty (see Rule 20-3). If the ball is not immediately recoverable another ball may be substituted.

Note: Guy wires supporting a temporary immovable obstruction are part of the temporary immovable obstruction unless the Committee, by Local Rule, declares that they are to be treated as elevated power lines or cables.

Exception: Ball striking elevated junction section of cable rising from the ground shall not be replayed.

4. Grass-covered cable trenches are ground under repair and Rule 25-1b applies.

The following Conditions and Local Rules apply in U.S. NIKE TOUR cosponsored tournaments ONLY

Marking Position of Lifted Ball - Appendix I
Before a ball on the putting green is lifted, its position shall be marked by placing a small coin or some similar object immediately behind the ball; if the ball-marker interferes with another player, it should be moved one or more putter head-lengths to one side. If the position of the ball is not so marked, the player shall incur a penalty of one stroke and the ball shall be replaced. If the ball is not replaced, the player shall incur the penalty for breach of Rule 20-3a, but no additional penalty under this Local Rule shall be applied. (This modifies Rule 20-1.)

Turf Plugs on Putting Greens
Turf Plugs on putting green are deemed to have the same status as hole plugs and thus may be repaired as prescribed in Rule 16-1c.

Pro-Am Competition - Amateur Players
During a separate pro-am round, if unable to score better than (net) par on a hole, amateur players are required to discontinue play of that hole.

Pro-Am Competition - Score Card
The professional player is responsible for recording scores on the score card of his team. The amateur player's gross score shall be entered when used as the team's best ball. The score card shall be signed by the professional player and attested by one of his amateur partners. Penalties for breach(es) shall be in accordance with the Rules of Golf, but apply only to the professional player.

NIKE TOUR RULES COMMITTEE

Tournament Officials
Mickey Bradley / Michael Combs / Matt Delany
Orlando Pope / Tony Wallin

Tournament Director
Jim Duncan

Assistant Tournament Director
Boots Widener

Official Scorekeeper
John Beaudet

[Logo]

* * * *

If the match was to be played on any day in a prescribed period, A and B must replay the match within the prescribed period. If it was too late for A and B to replay the match within the period, A and B are disqualified, unless one concedes the match to the other—see Rule 2-4.

It would not be proper to allow A to replay the round in the stroke play competition. A had already competed in that competition, and his score was unacceptable.

Competing Simultaneously in Bogey or Stableford Competition and Stroke Play Competition—See 32-1/1.

33-1/7 Making Competitors Responsible for Adding Scores

Q. May the Committee make it a condition of a competition that competitors are responsible for the addition of scores?

A. No. Such a condition would modify Rule 33-5.

Requirement that Alteration on Score Card Be Initialled—See 6-6a/6

33-1/8 Use of Golf Carts in Competition

Q. May a player use a golf cart during a competition?

A. Yes, unless such equipment is prohibited in the conditions of the competition (Rule 33-1).

33-1/9 Breach of Condition Prohibiting Golf Carts

Q. A condition of a competition prohibits the use of golf carts. If a player infringes this condition, what is the penalty?

A. If no penalty is stated, the general penalty applies at each hole where the cart is used, *i.e.*, loss of hole in match play (Rule 2-6) or two strokes in stroke play (Rule 3-5).

Who May Serve as Caddie—See 6-4/2

* * * *

PGA TOUR
Prize Escrow Fund
112 TPC Boulevard
Ponte Vedra, Florida 32082
904-285-3700

PAYER'S Federal ID number: 59-204-3648

RECIPIENT'S ID number: 542-74-4112

RECIPIENT'S name, street address, city, state and ZIP code:

Casey Martin
C/O Kevin Greig
1170 Pearl St.

Eugene, OR 97401-3500

Account number (optional)

2nd TIN Not. ☐

OMB No. 1545-0115

1997

Miscellaneous Income

2 Royalties $	
3 Other income $	
4 Federal income tax withheld $	5 Fishing boat proceeds $
6 Medical and health care payments $	7 Nonemployee compensation $ 3,000.00
8 Substitute payments in lieu of dividends or interest $	9 Payer made direct sales of $5000 or more of consumer products to a buyer (recipient) for resale ☐
10 Crop insurance proceeds $	11 State income tax withheld $
12 State/Payer's state number	

Copy C
For Payer
or State Copy

Form 1099-MISC Department of the Treasury - Internal Revenue Service

[redacted]

SCHEDULE C (Form 1040)
Department of the Treasury Internal Revenue Service (99)

Profit or Loss From Business
(Sole Proprietorship)

▶ Partnerships, joint ventures, etc., must file Form 1065.
▶ Attach to Form 1040 or Form 1041. ▶ See Instructions for Schedule C (Form 1040).

1996
Attachment Sequence No. 09

Name of proprietor

CASEY M MARTIN

Social security number (SSN)
542-74-4112

A Principal business or profession, including product or service
PROFESSIONAL GOLFER

B Enter principal business code (see page C-6) ▶ 8888

C Business name. If no separate business name, leave blank.
CASEY MARTIN

D Employer ID number (EIN), if any

E Business address (including suite or room no.) ▶ 3639 SPRING BLVD.
City, town or post office, state, and ZIP code EUGENE, OR 97405

F Accounting method: (1) [X] Cash (2) [ ] Accrual (3) [ ] Other (specify) ▶

G Did you "materially participate" in the operation of this business during 1996? If "No," see page C-2 for limit on losses [X] Yes [ ] No

H If you started or acquired this business during 1996, check here ▶ [ ]

Part I Income

1	Gross receipts or sales. Caution: *If this income was reported to you on Form W-2 and the "Statutory employee" box on that form was checked, see page C-2 and check here* ▶ [ ]	1	[redacted]
2	Returns and allowances	2	
3	Subtract line 2 from line 1	3	[redacted]
4	Cost of goods sold (from line 42 on page 2)	4	
5	Gross profit. Subtract line 4 from line 3	5	[redacted]
6	Other income, including Federal and state gasoline or fuel tax credit or refund	6	
7	Gross income. Add lines 5 and 6 ▶	7	[redacted]

Part II Expenses. Enter expenses for business use of your home only on line 30.

8	Advertising	8		19	Pension and profit-sharing plans	19	
9	Bad debts from sales or services (see page C-6)	9		20	Rent or lease (see page C-6):		
10	Car and truck expenses (see page C-6)	10		a	Vehicles, machinery, and equipment	20a	
11	Commissions and fees	11		b	Other business property	20b	
12	Depletion	12		21	Repairs and maintenance	21	
13	Depreciation and section 179 expense deduction (not included in Part III)	13		22	Supplies (not included in Part III)	22	[redacted]
14	Employee benefit programs (other than on line 19)	14		23	Taxes and licenses	23	
15	Insurance (other than health)	15	[redacted]	24	Travel, meals, and entertainment:		
16	Interest:			a	Travel	24a	
a	Mortgage (paid to banks, etc.)	16a		b	Meals and entertainment		[redacted]
b	Other	16b		c	Enter 50% of line 24b subject to limitations (see page C-6)		[redacted]
17	Legal and professional services	17	[redacted]	d	Subtract line 24c from line 24b	24d	[redacted]
18	Office expense	18	[redacted]	25	Utilities	25	[redacted]
				26	Wages (less employment credits)	26	
				27	Other expenses (from line 48 on page 2)	27	[redacted]
28	Total expenses before expenses for business use of home. Add lines 8 through 27 in columns ▶					28	[redacted]
29	Tentative profit (loss). Subtract line 28 from line 7					29	[redacted]
30	Expenses for business use of your home. Attach Form 8829					30	
31	Net profit or (loss). Subtract line 30 from line 29. • If a profit, enter on Form 1040, line 12, and ALSO on Schedule SE, line 2 (statutory employees, see page C-5). Estates and trusts, enter on Form 1041, line 3. • If a loss, you MUST go on to line 32.					31	[redacted]
32	If you have a loss, check the box that describes your investment in this activity (see page C-5). • If you checked 32a, enter the loss on Form 1040, line 12, and ALSO on Schedule SE, line 2 (statutory employees, see page C-5). Estates and trusts, enter on Form 1041, line 3. • If you checked 32b, you MUST attach Form 6198.					32a [ ] All investment is at risk. 32b [ ] Some investment is not at risk.	

LHA For Paperwork Reduction Act Notice, see Form 1040 instructions. Schedule C (Form 1040) 1996

[redacted]

Part III Cost of Goods Sold (see page C-6)

33 Method(s) used to value closing inventory: a ☐ Cost b ☐ Lower of cost or market c ☐ Other (attach explanation)

34 Was there any change in determining quantities, costs, or valuations between opening and closing inventory? If "Yes," attach explanation ☐ Yes ☐ No

35	Inventory at beginning of year. If different from last year's closing inventory, attach explanation	35	
36	Purchases less cost of items withdrawn for personal use	36	
37	Cost of labor. Do not include salary paid to yourself	37	
38	Materials and supplies	38	
39	Other costs	39	
40	Add lines 35 through 39	40	
41	Inventory at end of year	41	
42	Cost of goods sold. Subtract line 41 from line 40. Enter the result here and on page 1, line 4	42	

Part IV Information on Your Vehicle. Complete this part ONLY if you are claiming car or truck expenses on line 10 and are not required to file Form 4562 for this business. See the instructions for line 13 on page C-3 to find out if you must file.

43 When did you place your vehicle in service for business purposes? (month, day, year) ▶ / /

44 Of the total number of miles you drove your vehicle during 1996, enter the number of miles you used your vehicle for:

a Business _____ b Commuting _____ c Other _____

45 Do you (or your spouse) have another vehicle available for personal use? ☐ Yes ☐ No

46 Was your vehicle available for use during off-duty hours? ☐ Yes ☐ No

47a Do you have evidence to support your deduction? ☐ Yes ☐ No

b If "Yes," is the evidence written? ☐ Yes ☐ No

Part V Other Expenses. List below business expenses not included on lines 9-26 or line 30.

MISCELLANEOUS	[redacted]
CADDIE	[redacted]
ENTRY FEES	[redacted]
AIRFARE	[redacted]
CAR RENTAL	[redacted]
LODGING	[redacted]
AUTO EXPENSE	[redacted]
BANK CHARGES	[redacted]
RANGE FEES	[redacted]
48 Total other expenses. Enter here and on page 1, line 27	[redacted]

[redacted]

SCHEDULE SE (Form 1040)

Department of the Treasury
Internal Revenue Service

Self-Employment Tax

▶ See Instructions for Schedule SE (Form 1040).
▶ Attach to Form 1040.

OMB No. 1545-0074

1996

Attachment Sequence No. 17

Name of person with self-employment income (as shown on Form 1040)

CASEY M MARTIN

Social security number of person with self-employment income ▶ 542 | 74 | 4112

Who Must File Schedule SE

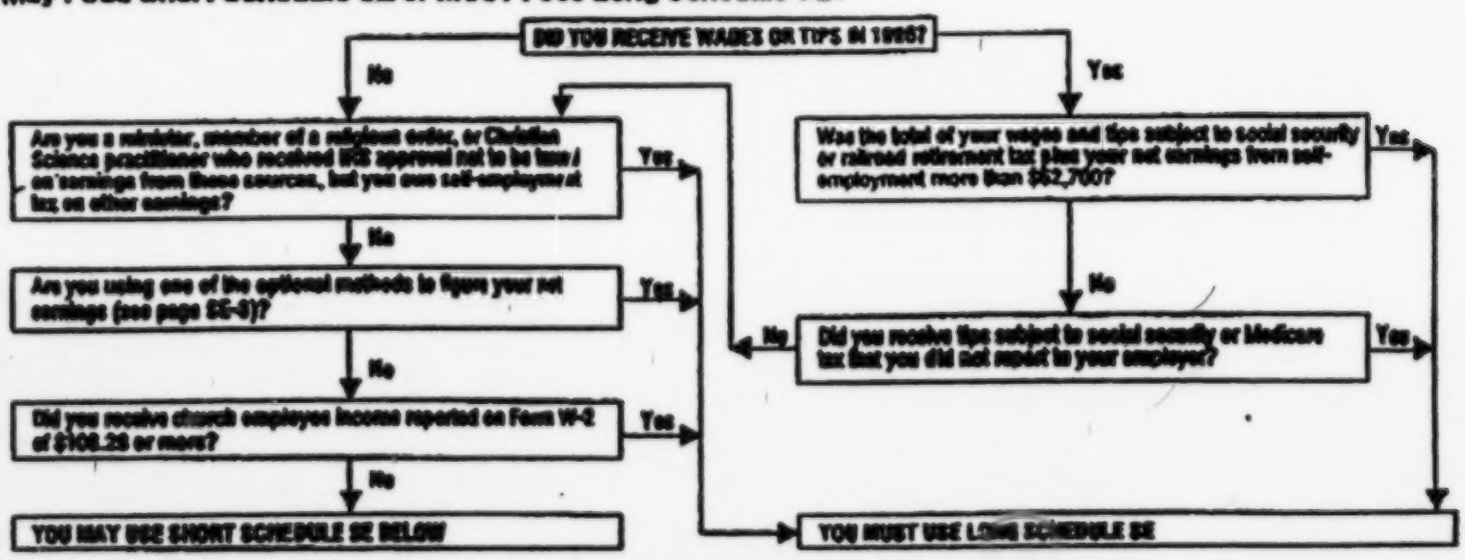
You must file Schedule SE if:

- You had net earnings from self-employment from other than church employee income (line 4 of Short Schedule SE or line 4c of Long Schedule SE) of $400 or more, OR
- You had church employee income of $108.28 or more. Income from services you performed as a minister or a member of a religious order is not church employee income. See page SE-1.

Note: Even if you have a loss or a small amount of income from self-employment, it may be to your benefit to file Schedule SE and use either "optional method" in Part II of Long Schedule SE. See page SE-3.

Exception. If your *only* self-employment income was from earnings as a minister, member of a religious order, or Christian Science practitioner, and you filed Form 4361 and received IRS approval not to be taxed on those earnings, do not file Schedule SE. Instead, write "Exempt-Form 4361" on Form 1040, line 45.

May I Use Short Schedule SE or MUST I Use Long Schedule SE?



Section A - Short Schedule SE. Caution: *Read above to see if you can use Short Schedule SE.*

1 Net farm profit or (loss) from Schedule F, line 36, and farm partnerships, Schedule K-1 (Form 1065), line 15a	1	
2 Net profit or (loss) from Schedule C, line 31; Schedule C-EZ, line 3; and Schedule K-1 (Form 1065), line 15a (other than farming). Ministers and members of religious orders see page SE-1 for amounts to report on this line. See page SE-2 for other income to report — SEE STATEMENT 4	2	[redacted]
3 Combine lines 1 and 2	3	[redacted]
4 Net earnings from self-employment. Multiply line 3 by 92.35% (.9235). If less than $400, do not file this schedule; you do not owe self-employment tax ▶	4	[redacted]
5 Self-employment tax. If the amount on line 4 is: • $62,700 or less, multiply line 4 by 15.3% (.153). Enter the result here and on Form 1040, line 46. • More than $62,700, multiply line 4 by 2.9% (.029). Then, add $7,774.80 to the result. Enter the total here and on Form 1040, line 46.	5	[redacted]
6 Deduction for one-half of self-employment tax. Multiply line 5 by 50% (.5). Enter the result here and on Form 1040, line 25	6	[redacted]

LHA For Paperwork Reduction Act Notice, see Form 1040 Instructions.

Schedule SE (Form 1040) 1996

[redacted]

TOURNAMENT FACILITIES AGREEMENT

THIS AGREEMENT, dated January 19, 1996 is made by and between Championship Management, a division of PGA TOUR, Inc., a Maryland corporation, with its principal offices located at 112 TPC Boulevard, Ponte Vedra, Florida 32082 ("CM") and East Lake Golf Club, a Georgia corporation, with its principal office located at 600 Peachtree Street, Suite 3830, Atlanta, Georgia 30308 ("EL").

* * * *

ARTICLE 1.

DEFINITIONS

1.1 Clubhouse. The term "Clubhouse" means the Clubhouse at the Golf Facility together with all adjacent decks, buildings, patios, and recreational amenities (e.g., tennis courts swimming pool, etc.) immediately adjacent to the clubhouse building.

1.2 Golf Facility. The term "Golf Facility" means East Lake Golf Club facility, which shall include, but not be limited to, one (1) 18-hole golf course commonly referred to as the Championship Course, clubhouse, golf shop, driving range, putting green, practice areas, storage areas, maintenance areas, halfway houses, shelters and parking areas.

1.3 Tournament Week. The term "Tournament Week" means the period of time beginning 12:01 a.m. on the Saturday preceding the Tournament and extending through the day following the completion of the Tournament competition. The scheduled dates for 1998 are October 26-November 1, 1998. These dates are subject to final approval of the Tournament Policy Board.

ARTICLE 2.

USE OF THE GOLF FACILITY

2.1 Golf Facility. EL hereby agrees to make available to CM, its guests, invitees and licensees the Golf Facility during Tournament Week. Specifically, EL shall make available to CM its guests, invitees and licensees, access to the Championship Course.

2.1.1 Total access to the Championship Course for Tournament purposes throughout Tournament Week.

CM acknowledges that the Championship course will be available for Club membership play through Friday preceding Tournament Week and commencing again at the conclusion of Tournament Week.

2.1.2 CM shall have the right to deny access to the Golf Facility, except the golf SHOP, during Tournament Week to any persons other than authorized CM personnel, emergency services personnel (e.g., police, fire and medical), participants and contestants, bona fide media representatives and persons holding valid admission badges, tickets or passes issued by CM in accordance with this Agreement. CM agrees that officers, board members and club staff require access to various restricted areas and will provide the appropriate credentials to allow access to those individuals, when in a working capacity.

2.1.3 CM acknowledges that the Golf Facility may be traversed by certain roads, pedestrian pathways and utility easements, which easements and rights-of-way may grant certain legal rights of access or passage by third parties who are outside the control of EL. CM hereby assumes the responsibility and expense of assuring the collection of admission fees and of the lawful denial of access to the Golf Facility by members of the Club and the public to the extent necessary for the conduct of the Tournament and related activities.

2.1.4 EL acknowledges that CM intends to utilize electronic scoreboards at the Tournament. The setup and removal of such scoreboards shall be undertaken by CM at no cost or expense to EL. CM agrees that, weather permitting, the electronic scoreboards will be removed from the golf course playing areas within one week following the conclusion of Tournament Week. CM agrees to repair any damage, under the supervision of EL, to the property occasioned by the setup and/or removal of such scoreboards, except for the areas of reasonable wear and tear, within two (2) weeks following the conclusion of Tournament Week.

2.1.5 CM will provide as agreed between CM and EL, a EL membership preferential sales package with respect to credentials permitting access to the Golf Facility during Tournament Week. CM agrees that the first two (2) Weekly Clubhouse Badges sold to each EL member will be at the Weekly Grounds Badge price (as such price is determined by CM).

2.1.6 EL shall make available their golf cart fleet for purposes of conducting Tournament operations Tournament Week. EL shall make available up to 12 golf carts in the 7 day period preceding and following Tournament Week to certain designated staff and tournament volunteers designated by CM for purposes of conducting Tournament set-up and logistics. Such carts will be provided on an "as available" basis so as not to interfere with normal club operations. Additionally, golf carts will not be permitted, or available for use by the amateur contestants playing in the Pro-Am unless said contestant is physically unable to walk the 18-hole course. All other Pro-Am contestants will walk with caddies. EL agrees to assist in recruiting and scheduling caddies for the Pro-Am. CM agrees to pay for such caddies at a cost not to exceed the usual caddie rate at East Lake.

2.2 Clubhouse. CM shall have the use of the Clubhouse during Tournament Week and may deny or restrict access to

the Clubhouse to any person other than those authorized by CM; including CM personnel, necessary emergency services personnel, participants, contestants, selected invitees of CM (e.g., patrons, Clubhouse badge holders) and persons with proper Clubhouse credentials. CM shall be solely responsible for regulating and enforcing such access restrictions. CM agrees that it will work with EL to designate the areas of the Clubhouse available for tournament use.

2.3 Clubhouse Food and Beverage. Notwithstanding the foregoing Section 2.2, EL shall retain the exclusive rights to conduct, collect and retain all revenues derived from the sale of food and beverage and alcohol and liquor sales within the clubhouse (EL shall also have the sole obligation to pay all expenses in connection therewith). EL agrees, with respect to regular dining room and bar operations within the clubhouse, to furnish food and beverage at a price which shall not exceed one hundred twenty-five percent (125%) of the Golf Facility's customary prices, during the week preceding Tournament Week except as otherwise agreed in advance by CM.

2.3.1 Clubhouse Credentials. CM agrees that the number of Clubhouse access credentials available for sale will be determined by EL. EL agrees to determine that quantity and notify CM no later than one (1) year prior to Tournament Week.

2.4 Golf Shop. Notwithstanding the foregoing Section 2.2, EL shall retain the exclusive rights to conduct, collect and retain all revenues from all pro shop operations (and EL shall also have the sole obligation to pay all expenses in connection therewith) excepting, however, revenues and related expenses of Tournament logoed items sold explained in Article 11.0 below.

2.5 Hospitality Areas. CM shall have the right to erect or arrange for the erection of domed, tented or similar hospitality areas on the Golf Facility. CM shall provide or

shall contract for the provision of all food, beverage, alcohol and liquor services to such hospitality areas and conduct, collect and distribute revenues derived from the sale of food, beverage, alcohol and liquor sales at such hospitality areas in accordance with the terms set forth in Section 6.0 below. EL acknowledges that CM may enter into an agreement with a third party concessionaire for the provision of such on-course food, beverage, alcohol and liquor sales.

2.6 On-Site Office Areas. Commencing within 30 days following the completion of the 1997 TOUR Championship and continuing through the end of the 1998 calendar year, EL shall provide to CM, for the purpose of coordinating and conducting the Tournament, office space located at the Golf Facility, or as near as possible, suitable for that purpose. Such space should be sufficient to provide adequate working space for up to 3 staff members, conference area, storage and limited volunteer work space, ideally totaling approximately 1,500 square feet. El shall provide basic office furnishings (desks, chairs, file cabinets, etc.). The furnishings for such office space shall be mutually acceptable to CM and EL. Office shall also include the use of the EL switchboard, base telephone service and telephone instruments. CM shall be responsible for all office equipment (computers, printers, fax machines, copiers, etc.) and shall reimburse EL for all long distance charges attributable to it's operations.

2.7 Parking.

2.7.1 In addition to all paved Clubhouse parking for use as VIP parking, EL will utilize best efforts to provide or make available at its cost a parking site for the general public as well as corporate VIP, which site may be located off the Golf Facility.

2.8 Maintenance. EL shall, at its expense, maintain the Golf Facility during Tournament Week as required by the TOUR Tournament Officials under the TOUR's then applicable Course Conditioning Guidelines, except to the

extent prohibited by applicable laws, rules and regulations. EL acknowledges that the full maintenance staff shall be required for each day of Tournament Week.

2.8.1 EL acknowledges that all normal and ordinary costs of maintaining the Golf Facility under the aforementioned Course Conditioning Guidelines (i.e. such costs as chemicals, fertilizers, sod, seed, labor costs, etc.) are the sole obligation of EL. TOUR acknowledges that certain requests for extraordinary improvements and/or modifications may be made by TOUR Rules Officials, TOUR Agronomy Staff or CM Staff and that the cost of such improvements and/or modifications would be the sole obligation of the Tournament, subject to approval prior to the commencement of any work.

2.9 Membership Lists. CM may, at its option and expense, prepare a Tournament "mailout" solicitation piece for distribution. EL shall, upon request by CM distribute such mailout to Club members.

* * * *

ARTICLE 5.
ACCESS TO GOLF FACILITY BEFORE AND AFTER TOURNAMENT

CM (and its Designees) shall have reasonable access to the Golf Facility for the six (6) week period prior to Tournament Week for purposes of preparation for the Tournament and for the six (6) week period following Tournament week for purposes of cleanup activities. CM agrees that all tents, scaffolding, equipment and other temporary structures will be removed from golf course playing areas within two weeks following the conclusion of the competition, weather permitting. CM acknowledges that such access shall not unreasonably hinder or impair normal play at the Golf Facility

* * * *

[Excerpt from Nike Tour Player Handbook & Tournament Regulations 1998—Draft]

* * * *

H. CADDIES AND GOLF CARTS

Players in cosponsored NIKE TOUR events shall not use automotive transportation unless otherwise determined by the Tournament Director, and then in accordance with procedures established by the Tournament Director. Unless otherwise determined by the Tournament Director, caddies must be employed for all practice rounds, qualifying rounds, pro-am rounds and tournament rounds.

Caddies shall be paid promptly. PGA TOUR shall determine who is eligible to be employed as a caddie. Players who wish to bring their own caddies to a cosponsored event shall so indicate at the time they commit to participate in such event and shall be responsible for the conduct and behavior of such caddies at such events.

* * * *

PGA TOUR
112 TPC Boulevard
Ponte Vedra Beach, Florida 32082
904-285-3700

[LOGO]

October 17, 1997

TO: PGA TOUR Tournament Association Members
SENIOR PGA TOUR Tournament Association
[Members]
NIKE TOUR Tournament Sponsors

FROM: W. William Calfee

RE: 1998 PGA TOUR Credentials

In 1998 PGA TOUR credentials will be color coded as follows: Blue, Red and Green. Since these color codes (blue, red & green) grant access to player areas, we ask each sponsoring organization to refrain from using these colors for credentials purposes during your tournament (i.e., corporate hospitality, patron hospitality, pro-am contestants, etc.) Your cooperation will be greatly appreciated. Listed below is a detailed description of each credential.

The following credentials will be color coded blue:

1. Membership

   A. 1998 PGA TOUR, Senior PGA TOUR and NIKE TOUR Member Money Clip (gold, rectangular, logo color coded blue);

   B. 1998 PGA TOUR Staff Money Clip (silver, rectangular, logo color coded blue);

   C. 1998 PGA TOUR Rules Official Money Clip (gold, square, logo color coded blue)

   D. 1998 PGA TOUR, SENIOR PGA TOUR and NIKE TOUR Contestant Badges (white, blue color bar with tournament's logo, plastic & rectangular).

   The above-listed credentials receive access to the following areas at PGA TOUR cosponsored or coordinated tournaments:

   1. Contestant Parking
   2. Contestant Locker Room
   3. All Clubhouse Areas (except Ladies Locker Room)
   4. Media Center (press room)
   5. Inside Ropes on Practice Areas
   6. Inside Ropes on Golf Course

2. Member's/Staff Ladies Credentials:

   A. 1998 PGA TOUR Member Ladies Pin (silver & gold, oval, logo color coded blue);

   B. 1998 PGA TOUR Staff Ladies Pin (silver, oval, logo color coded blue)

   C. 1998 NIKE Tour Ladies Pin (silver & gold, oval logo color coded blue)

   The above-listed credentials receive access to the following areas at PGA TOUR cosponsored or coordinated tournaments:

   1. Contestant Parking
   2. Ladies Locker Room
   3. All Clubhouse Areas (except contestant locker room)
   4. Player hospitality
   5. Media Center (press room)
   6. Golf Course (outside ropes)

3. Media - 1998 PGA TOUR Media badge (square shape, photo identification or media affiliate's logo, color coded blue)

   The above-listed credential receives access to the following areas at PGA TOUR cosponsored or coordinated tournaments:

   1. Media parking
   2. Contestant Locker Room (except during suspension of play)
   3. All Clubhouse Areas (ladies locker room only for females)
   4. Media Center (press room)
   5. Inside ropes on Practice Tee (during tournament week.)
   6. Golf Course (with special daily media credential during competitive round, provided not more than one arm length's away from ropes)

4. 1998 PGA TOUR Tournament Association, Senior PGA TOUR Tournament Association and NIKE TOUR Sponsor Badge (square shape, photo identification or tournament sponsor's logo, color code blue)

   The above-listed credentials receive access to the following areas at PGA TOUR cosponsored or coordinated tournaments:

   1. Preferred Parking (space available during tournament week)
   2. Contestant Locker Room (except during suspension of play)
   3. Clubhouse
   4. Practice Areas (only one tournament association member may be in the designated practice area at a time)

5. 1998 PGA TOUR Support (square shape, photo identification, color code blue)

   The following companies or individuals provide support to PGA TOUR cosponsored events on a weekly basis; PGA TOUR Productions Camera Crew, Darrell Survey, Special Event Productions, Tenet Healthcare, Keller Furniture Mobile Weather Team and Contract Score Board employees:

   The above-listed credentials receive access to the following areas at PGA TOUR cosponsored or coordinated tournaments:

   1. Clubhouse parking (all week)
   2. Contestant Locker Room (except during suspension of play)
   3. Golf Course (inside ropes)
   4. Media Center
   5. Practice Areas (inside ropes)
   6. Corporate Hospitality areas

6. PGA TOUR Golf Instructor badge (square shape, photo identification, color code blue)

   The above listed credential receives access to the following areas at PGA TOUR cosponsored or coordinated tournaments:

   1. Contestant Parking (space available)
   2. All Clubhouse Areas
   3. Locker room (except during suspension of play)
   4. Inside ropes on Practice Areas (only if accompanied by player)
   5. Inside ropes on Golf Course during practice rounds (only if accompanied by player)
   6. Outside ropes during pro-am and official competition

The following credential will be color coded red:

1. Manufacturers' badge (square shape, photo identification or manufacturer logo, color code red)

   The above-listed credential receives access to the following areas at PGA TOUR cosponsored or coordinated tournaments:

   1. Preferred parking (spaces available, practice & pro-am days only)
   2. Contestant locker room (practice & pro-am days only)
   3. Clubhouse area (during tournament week)
   4. Manufacturers will not be permitted on practice areas unless invited by a contestant with whom they have an appointment (practice & pro-am days only)
   5. Golf Course (outside ropes)

The following credential will be color coded green:

1. Player Manager badge (square shape, photo identification, color code green)

   The above listed credential receives access to the following areas at PGA TOUR cosponsored or coordinated tournaments:

   1. Preferred parking (space available, practice & pro-am days only)
   2. Contestant locker room (practice & pro-am days only)
   3. Clubhouse area (during tournament week)
   4. Grounds (during tournament week)

Caddie identification

A. 1998 PGA TOUR Caddie Identification Card (white, plastic & rectangular)

B. 1998 Professional Caddie Association Card (white, rectangular with photo ID on the back of laminated card)

The above listed credentials receive access to the following areas at PGA TOUR cosponsored or coordinated tournaments:

1. Caddie Parking
2. Inside ropes on practice areas (only if accompanied by a player)
3. Inside ropes on golf course (only if accompanied by a player)

* * * *

CONFIDENTIAL

MINUTES
OF
PGA TOUR POLICY BOARD

9:00 a.m., Tuesday, March 18
Buena Vista Palace
Orlando, Florida

* * * *

I. Approval of Minutes

* * * *

3. PGA TOUR Qualifying Tournament

Commissioner Finchem then reviewed with the Board the current status of The PGA TOUR Qualifying Tournament and asked the Board to consider several changes to improve the tournament.

The PGA TOUR Qualifying Tournament consists of three stages of competition. The first stage consists of 72 holes of stroke play at eleven sites. Approximately 78 contestants play at each first stage site. Successful qualifiers at this stage advance to the second qualifying stage which consists of 72 holes of play at six sites, again with 78 players at each location. Successful qualifiers at each second stage site advance to the final stage. The final stage consists of 180 players, plus international exemptions, competing over 108 holes on two courses.

The field at the final stage is reduced to the low 90 scorers plus ties after 72 holes. The low 40 scorers plus ties gain PGA TOUR membership.

The Commissioner stated that the TOUR's philosophy has always been to conduct the Qualifying Tournament in a manner that approximates a PGA TOUR event as closely as possible and that significant improvement had been made in the quality of the golf courses that are played at each stage. Additionally the same course setup guidelines

that are in place on the PGA TOUR are used for the Qualifying Tournament.

The Commissioner reported however, that the pace of play at the final stage had been a concern. With 188 players in the field, rounds at the final stage of this past year's Q-School ranged between five and six hours before the 72 hole cut and averaged about six hours after the cut. In an effort to improve the pace of play at finals, the Commissioner asked the Board to approve the following changes:

1. Reduce the field size at the final stage to 168 players including the international exemptions. To offset this reduction in field size, the alternates (three from each of the six second stage sites) that do not get into the finals would be given conditional NIKE TOUR cards.

2. Reduce the 72-hole cut from the low 90 and ties to the low 72 scores and ties which will significantly improve pace of play in the final two rounds by providing for some manageable number of players the last two rounds.

The Commissioner further reported that currently a play-off is conducted at the finals following conclusion of play on the final day to determine the 70th and last fully exempt NIKE TOUR player. Players who might be involved in the play-off are asked to stay for two additional days after missing the 72-hole cut. As an alternative, the Commissioner asked the Board to approve elimination of the play-off in favor of awarding exempt NIKE TOUR status to the top 70 players plus ties after the top 40 finishers and ties who earn PGA TOUR membership.

Commissioner Finchem reported that $150,000 in prize money had been distributed in each of the last four years (1993-1996) and that the purse had not been increased since 1993 when it was raised from $100,000 to $150,000 in conjunction with an increase in Q-School entry fees.

With Q-School revenues increasing over the last four years Commissioner Finchem stated he felt it appropriate to increase the purse from $150,000 to $300,000.

Finally, Commissioner Finchem recommended that the Board approve the elimination of carts at Q-School Finals to more accurately approximate conditions the qualifiers will encounter on the PGA TOUR.

After receiving input from the Player Directors, the recommended changes to the Qualifying Tournament were altered to raise the recommended purse increase to $500,000 instead of $300,000. Additionally, consideration will be give prior to ratification of capping the number of NIKE players earning exempt status as a result of eliminating the playoff for the 70th position.

On a motion by Mr. Love and a second by Mr. Haas, the board voted to approve the approve the following changes to Q-School:

1. Reduce the field size at the final stage to 168 including the international exemptions from 180 plus the international exemptions.
2. Reduce the 72-hole cut at the final stage to the low 72 scorers plus ties from the low 90 scorers plus ties.
3. Eliminate the play-off for the 70th NIKE TOUR position in favor of awarding exempt status to the top 70 finishers plus ties after the Top 40 finishers and ties who earn PGA TOUR membership.
4. Eliminate the use of carts at the final stage.
5. Increase the purse from $150,000 to $500,000 and change the distribution so that all players that survive the 72-hole cut at finals get paid.

* * * *

[Excerpt of the Rules of Golf of the Pacific-10 Conference]

* * * *

(1) <u>Cars, Carts, and Caddies</u>.

Participants may not use cars or carts to carry their clubs. An exception to this policy may be granted by a majority vote of the coaches if the individual is permamently disabled. A written request must be submitted to the Conference office with accompanying medical statements requesting the use of a car at least one week in advance of the Championships. Pull carts may be used under unusual circumstances, subject to approval of the Games Committee. Such request must be made at least one week in advance of the Championships. Caddies may not be used. (5/73, 8/84, 6/90, 6/94)

* * * *

NOTICE TO COMPETITORS
1997 Bob Hope Chrysler Classic
January 15-19, 1997

THIS INFORMATION SUPPLEMENTS THE PGA TOUR CONDITIONS OF COMPETITION AND LOCAL RULES

PRO-AM ONLY

Team Net Best Ball. When unable to assist their pro-am team score, amateurs shall pick up their ball. (Par is *NOT* your partner!)

OUT OF BOUNDS:

Out of bounds is defined by white stakes and/or white stakes with red tops and where tying into inside edge of street curbings, walls, chain link or green web fences. A ball coming to rest beyond this boundary is out of bounds, even though it may be in the playing area of another hole.

PRACTICE: PERMITTED ON THE DRIVING RANGE BETWEEN HOLES #9 & 10; AND HOLES 18 & 1.

Practice will be permitted on the driving range at all courses between the play of Holes #9 and 10 and also between the play of Holes #18 and 1, should there be a delay at the turn. Practice is permitted on the driving range provided there is no undue delay.

PRACTICE AT PUTTING GREEN OF HOLE PLAYED PROHIBITED

Practice at putting green of Hole played is prohibited for all five rounds. See appendix I of Rules of Golf.

INDIAN WELLS:

Hole #5 & 6: Snow fence behind #5 green and to the right of Hole #6 is a temporary immovable obstruction.

TRANSPORTATION: INDIAN RIDGE ONLY!

Players at Indian Ridge are permitted to ride between the putting green of the last hole played to the next teeing ground.

PGA TOUR RULES COMMITTEE
Steve Carman
Orlando Pope
Perry Williams

NOTICE TO COMPETITORS
1997 AT&T PEBBLE BEACH NATIONAL PRO-AM

This supplements the Local Rules and Conditions of Competitions for PGA TOUR.

FORMAT

Pro-Am - Four ball stroke play - see Rule 31.

Scoring – The marker is required to record for each hole only the gross score of whichever partner's score is to count. The gross scores to count must be individually identifiable; otherwise, the side shall be disqualified. Only one of the partners need to be responsible for complying with Rule 6-6b.

Professional Only – stroke play.

TEEING GROUNDS

Professionals players shall start play on each hole from teeing grounds defined by blue tee-markers. Amateur players shall start play on each hole from teeing grounds defined by white tee-markers.

PACE OF PLAY

In order that play is at reasonable pace, amateur players are requested to pick up when they cannot help their side's net or gross score. PGA TOUR Pace of Play Guidelines shall be in effect.

OUT OF BOUNDS

Defined by white stakes and when white stakes tie into them, fences, walls, the inside edge of roads and at hole #12 at Poppy Hills, the right curb of the cart path.

SPYGLASS HILL-BUNKER HOLE #4

The bunker encircled with a white line, located at the left back side of the green is classified as "through the green" and is ground under repair.

LOWER PUTTING GREEN ON HOLE #2 AT POPPY HILLS

The lower putting green is a wrong putting green – See Rule 25-3.

SHUTTLE AT POPPY HILLS

Players are permitted to ride between hole #'s nine and ten.

BALL DROP AREAS ON HOLE #18 AT PEBBLE BEACH

As an addition option under Rule 26-1, a ball in the lateral water hazard may be dropped under penalty of one stroke on the nearest area marked "Ball Drop" that is not nearer the hole than where the ball last crossed the margin of the lateral water hazard. There are four "Ball Drops" located alongside the fairway bunker.

SEAWALL HOLE #18 AT PEBBLE BEACH

The right side of the wall is an immovable obstruction. The margin of the lateral water hazard is defined by red dots on the top of the wall.

PGA TOUR RULES COMMITTEE

NOTICE TO COMPETITORS

1997 QUAD CITY CLASSIC

This information supplements the PGA TOUR RULES OF PLAY.

OUT OF BOUNDS – Defined by white stakes and where applicable white stakes tying into snow fencing and green web fencing.

The Driving Range is out of bounds. Defined by white stakes and where applicable white stakes tying into chain link fencing, snow fencing and green web fencing.

FLOWER BEDS – are ground under repair. Defined by wooden ties, black plastic or the cut of the ground.

AUTOMOTIVE TRANSPORATION – Competitors are permitted to use Automotive Transportaion during play of Hole #12.

PGA TOUR RULES COMMITTEE

* Do not put a white line around the TV Compound!

[Excerpt of the 1998 PGA TOUR Official Media Guide of the PGA TOUR]

ALL-EXEMPT TOUR PRIORITY RANKINGS

Each PGA TOUR player has earned a position on the priority ranking system that will be used to select tournament fields. The complete ranking system, in order of priority, is as follows:

* * * *

16. Four low scorers at Open Qualifying, which shall normally be held on Monday of tournament week.

* * * *

APPLICATION TO ENTER
1997 PGA TOUR QUALIFYING TOURNAMENT
(FOR PGA TOUR AND NIKE TOUR)

[Logo] CONDUCTED BY THE PGA TOUR [Logo]

First Qualifying Stage (72 Holes Scheduled)
Second Qualifying Stage (72 Holes Scheduled)
Final Qualifying Stage (108) Holes Scheduled)

* * * *

II. PGA TOUR MEMBERSHIP

PGA TOUR memberships for 1998 will be awarded to the lowest 35 finishers and any tying for 35th position after the conclusion of play in the Final Qualifying Stage.

* * * *

V. ENTRY FEES; CLOSING DATE

ENTRY APPLICATIONS MUST REACH PGA TOUR HEADQUARTERS BY 5:00 P.M. EDT ON FRIDAY, SEPTEMBER 26, 1997. NO FACSIMILE APPLICATIONS WILL BE ACCEPTED.

ALL APPLICANTS MUST ENTER BY THE ENTRY DEADLINE OF SEPTEMBER 26, 1997, WITHOUT EXCEPTION.

Subsequent to and based upon final results of the NIKE TOUR Championship, some exemptions into the Second Qualifying Stage will be earned. Such applicants will be refunded $250 and their entry will be adjusted.

A. Applicants required to play in the FIRST QUALIFYING STAGE: $3000

B. Applicant required to play in the SECOND QUALIFYING STAGE: $2,750

C. Applicants required to play in the FINAL QUALIFYING STAGE: $2,500

NOTE: Entry fees for First and Second Qualifying Stages includes greens fees, practice balls and, if applicable, half of an 18-hole golf cart on each day beginning at noon two days before and during every day of competition. Entry fee for Final Qualifying Stage includes greens fees and practice balls beginning two days before and during every day of competition. Use of golf carts is prohibited at the Final Qualifying Stage; players are required to use caddies.

* * * *

CADDIES/GOLF CARTS

A caddie and/or golf cart is required during all practice and tournament rounds of the First and Second Qualifying Stages. No more than two carts will be allowed per grouping. The player may designate an individual to serve as a caddie and drive a cart for him. Caddies are required to wear long pants while on property. Use of golf carts is prohibited during the Final Qualifying Stage. Players are required to use caddies.

* * * *

TRANSCRIPT OF PROCEEDINGS

DEPOSITION OF RICHARD HILLS
January 4, 1998

* * * *

Q. As assistant executive director of the PGA European Tour, Mr. Hills, are you familiar with the tournament rules and regulations that apply to PGA European Tour events?

A. Yes, I'm familiar with the local rules as currently active on the PGA European Tour.

Q. Could you explain to us briefly for the record, if you will, Mr. Hills, exactly what kinds of competitions the PGA European Tour sponsors or promotes?

A. The PGA European Tour is the sanctioning body of tournament professional golf in Western Europe. It conducts a series of events throughout Europe, some 37 in 1997 which are predominantly 72-hole stroke events.

* * * *

Q. Mr. Hills, does the PGA European Tour have a rule prohibiting use of golf carts in its competitions?

A. Yes, we have a local rule

* * * *

DEPOSITION OF BRIAN KENNETH GRANT ALLAN
January 4, 1998

* * * *

Q. Have members of the Australasia tour, sir, ever been permitted to use carts during the tournament play itself?

A. No.

Q. Would you tell us for the record, sir, what the reason is that the Australasia tour has a rule prohibiting the use of golf carts by competitors during the course of its competitions?

A. Well, at this level of golf an integral part is the athletic ability to be able to walk 72 holes of a golf course and play, maintain your position in the field.

Q. Is it your opinion, sir, that players on the Australasia tour if some players were permitted to use a golf cart and others were not, that the players who were permitted to use a golf cart would have an advantage over the other players?

A. Simply, yes, they would. It's physically less demanding to ride.

* * * *

DEPOSITION OF ARNOLD MENTZ
January 4, 1998

* * * *

Q. Now, Mr. Mentz, as commissioner of the PGA Tour of Southern Africa are you aware of the rules that apply to competitions of your tournament?

A. Yes, sir.

Q. Does the PGA Tour of Southern Africa, sir, have a rule relating to the use of golf carts in its competitions? Just answer "yes" or "no."

A. Yes.

Q. And does that rule prohibit the use of golf carts?

A. Yes.

* * * *

Q. Now, Mr. Mentz, are you aware, sir, of the reason why the PGA Tour of South Africa prohibits the use of motorized carts in its. professional competitions?

A. Yes, sir.

Q. What is the reason?

A. The reason is that it's an unfair advantage to anybody using a cart playing in a tournament against the other players.

Q. Why does the PGA Tour of Southern Africa consider it an unfair advantage for a competitor to use a golf cart in its competitions?

A. Because the integral bond of golf and professional golf is to walk the 18 holes and play in a tournament.

* * * *

Q. Are players in tournaments on the PGA Tour of Southern Africa ever permitted to use carts during the course of play itself?

A. Not at all.

* * * *

Q. Do you prefer to use a cart if given the opportunity?

A. No, ma'am.

Q. Excuse me?

A. No, I don't.

Q. Why is that?

A. Because I have problems in judging my distances. By walking the golf course you get a more feel of the golf course and the shots to play, where in a golf cart you miss that feeling in playing the game.

* * * *

VIDEOTAPED DEPOSITION OF SCOTT VERPLANK
January 12, 1998

* * * *

Q. Have you, Mr. Verplank, retained exempt status on the PGA Tour at all times since you became a professional in 1986?

A.No, I haven't. I've, um, had a series of ups and downs, to be honest with you, and most of them had to do with physical problems. And I can really only think of one year where I really just didn't play very good and didn't retain my status.

But the rest of the time it was all from different physical problems, elbow surgeries and stuff of that nature.

Q. Tell the court, if you would Mr. Verplank, what kinds of physical difficulties you've had over the course of your professional career.

A. Well, as far as my career goes, you know, as far as actually playing golf, I've had three different elbow surgeries, two on my right elbow and one on my left . And they were—they were different problems, but, you know, related to playing golf, more or less.

And then on top of that, I'm diabetic. And I've been diabetic since I was 9 years old. I'm 33 now, so that's 24 years.

Q. How does the fact that you have diabetes affect you in terms of your physical performance as a golfer?

A. Well, um, you know, most guys come out here and they prepare themselves hitting balls and chipping and putting and working on their game, getting all that. And that's going to go a long way towards determining how they play. I'm a little different in the fact that my number one priority is how do I feel and is my health—is my diabetic condition conducive to me being able to perform.

And if it's not, I usually don't perform very well. If I'm feeling good and feeling strong, and, you know, have lots of

energy and everything is going okay, my chances of playing up—or playing good go up significantly.

Q. Okay. And has your diabetes, from time to time since you became a professional, affected your level of performance at various times?

A. Oh, yeah. I mean—yeah. It really affects it every time I play because it's either going to be I'm feeling good and I got my chance to play good, or if I'm feeling bad, my chances of playing very well aren't very good.

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To what extent does fatigue affect the level of performance of professional golfers at the PGA Tour and Nike Tour level?

A. I—you know, a lot it depends on the conditions, the golf course you're on, the weather and all that. But in some instances it's the—it's the—really, maybe the most important factor. I mean, if you're playing in the middle of the summer on a hilly golf course and it's 98 degrees, I mean, you're doing all you can do to keep from running out of juice. I mean, whether that's—you know, I would assume it's the same for everybody.

* * * *

Q. And explain to the court, if you would, Mr. Verplank, how fatigue affects the performance of a golfer at the level of competition that we're talking about.

A. Well, um, technically, if your body is tired, your muscles are tired, you know, not performing well, you're not going to be able to swing the golf club and perform the kind of golf shots that you need. You know, you might lose a little distance. Or if you don't hit the ball solid, which is, you know, a big difference between amateur golfers and us. You know, our tour is about hitting the ball solid.

And if you can hit the ball solid when you're tired then, you know, that's kind—sometimes it's kind of a luck factor if you're that tired. But it makes a big difference. I mean, if you—you need to be feeling normal, you know, a little bit hyped up, feeling strong and all that to feel like you can play to your best ability.

Q. Does fatigue during the course of a golf tournament, Mr . Verplank, sometimes affect the accuracy with which you hit a shot?

A. There's no question. I was kind of saying that a minute ago, but I kind of stopped. If you're tired—you know, personally, for me—I know every golfer is different every person is different. But if I'm tired, I will generally not be able to hit the ball as straight and as accurately, because if my muscles aren't working as good, you know, your timing gets off.

* * * *

Q. Let me make sure I understand, Mr. Verplank. When you went over to the PGA Tour office during the course of the 1997 National Qualifying Tournament after you had heard that the court had entered an injunction permitting Casey Martin to use a golf cart in the course of that competition, you told the tour personnel that you spoke with that you didn't think that was fair?

A. Exactly. I told them it wasn't fair.

Q. And tell the court, if you would, sir, what you meant when you told them that it wasn't fair.

A. Because it was an advantage to ride in a golf cart.

* * * *

Q. Why is it an advantage to ride in a golf cart, sir?

A. The fatigue—the fatique factor alone. But I think there's other advantages, too. But I told the officials there, I said, "This is a marathon as much as anything."

I said, "It's a long golf tournament."

I said, "It's a taxing golf tournament. It's the most"—you know, "one of the most stressful events in most people's life to play in that because it's basically you're—what you're going to get to do for the next 12 months."

And I said, "You just—you can't give a kid one up on the first tee that he doesn't have to walk and everybody else does, because"—

I said, "If I could ride the first four—you know, the first two rounds, then I'm going to be a lot less tired on rounds 5 and 6."

It's a long tournament—I mean, it's a long tournament. I mean, it's a long week, and if you haven't ever done it, then you really don't even know how hard it—how tiring and taxing it is.

But I just said, "You just can't do that." I said, "The young man would have a huge advantage getting to ride."

* * * *

Well, anyway, so I just felt as though it was a long tournament; there would be a big advantage to be able to ride if everybody else had to walk, just from the physical conditioning and fatigue and stamina standpoint of the whole thing.

* * * *

Q. And so in order to make it fair for all the competitors in the National Qualifying Tournament, they permitted you and the others to use a golf cart if you wished?

A. Yes, sir.

Q. Now, you have—you have indicated, Mr. Verplank, that you were the winner of the National Qualifying Tournament. Would you tell the court whether and to what extent the use of a golf cart, in your view, assisted you during the course of that competition?

A. Well, um, I—I felt like that if I could ride some—maybe not even the whole tournament—some, that I would

be less tired come the last two rounds—you know, last two, three rounds of the tournament.

And just from a strictly fatigue—you know, stamina standpoint, I just figured that I'd feel a lot better near the end of the week if I could ride some in the first, and it wasn't so hard on me.

You know, and I—and to be honest with you, I rode the first day and played pretty good. I was leading after the first day. Rode the second day, and then had a huge lead after two days, and I said well—you know, being a typical golfer, I'm not gonna change anything. So I rode the whole week, felt great, never got tired.

* * * *

Q. Now, Mr. Verplank, am I correct, sir, that in all the years that you've been on the PGA Tour—approximately, I guess, 12 years, now, that you've been a PGA Tour member—it has always been the rule that competitors in PGA Tour Competitions must walk and are not permitted to ride?

A. Yeah, it has. It's a fundamental part of the—of playing golf on the PGA Tour.

Q. Explain to the court what you mean, sir, when you say that walking is a fundamental part of playing golf on the PGA Tour.

A. Well, because the PGA Tour is the highest level of golf on earth, now—at least in this country. And, um, you—it's always been about the physical—you know, the physical ability to get the golf ball into the hole. And walking has always been a part of that. You know, that's—I mean, that dictates the pace of play, your rhythm, your—you know, your breathing, your nervousness, your timing, all that. I mean, it affects all that.

* * * *

Q. Now, Mr. Verplank, based on your experience as a member of the PGA Tour, sir, do you have an opinion as to whether or not it would fundamentally alter the nature of the

competition on the PGA Tour or the Nike Tour if competitors in those events were permitted to use golf carts?

A. Well, yeah. I don't—you know, it would change the game. There's no question about it. It would change the competition, particularly if—if some people could and other people couldn't. It would just—it would make a difference. It would make an advantage. That's why I rode at the tour school, because I felt like I had—now I felt like two of us had one up on the first tee. And that's why I didn't understand why everybody else didn't ride.

* * * *

Q. Is it important, sir, that all of the competitors in a professional golf competition adhere to the same set of rules of competition?

A. Absolutely.

Q. Why is that important?

A. Well, it wouldn't be fair if you didn't. I mean, that's the whole—that's the whole premise of golf, is everybody starts equal; everybody's the same; everybody has the same rules to play by, same equipment.

You know, we have equipment standards out here that everybody has to—their equipment has to fall within just so nobody has an unfair advantage. And the only advantage you can get is how good can you play.

* * * *

DEPOSITION OF ARNOLD D. PALMER
January 12, 1998

* * * *

Q. Mr. Palmer, based on your knowledge and experience, and also based on your involvement in the original formation of the PGA Tour, would you tell the court what the reason is that the PGA Tour has a rule banning the use of golf carts in its competitions?

A. Well, of course, my feelings are fairly strong that the game is a physical game. And if you take—if the person isn't walking, then you're taking some of the physicalness out of the game. And conditioning and being in shape, like in any other sport, is part of the competition. And to be competitive, I feel that you have to be in good physical condition to excel or to be the best player. And the best players are the guys that are in the best condition.

* * * *

Q. When you say, Mr. Palmer, that walking the course is a part of the game, tell the court, if you would, precisely what it is that you mean.

A. Well, when you—when the game started, people—everybody walked. There was no other forms of transportation. There was no forms of transportation. And walking and playing the game—you had to walk. And that was part of the tradition of the game, tc walk and play.

I'm not sure that I can say much more than the fact that being competitive and being able to play the game was part of the whole thing. And that is walking.

Q. Now, Mr. Palmer, you also indicated that conditioning and physical fitness is a part of the game. Is it correct, sir, that fatigue by a golfer is one of the factors that affects a golfer's play during a tournament event.

A. There is no question about the fact that fatigue does play a very important part in the game of golf, both physically as well as mentally.

Q. Explain to the court, if you would, Mr. Palmer, briefly, how fatigue becomes a factor in tournament golf at the PGA Tour level.

A. Well I think its like anything else. Once you're fatigued, your thought processes are not as sharp as they are—I can say from my own personal point of view and having played professionally for 43 years, that when I get tired, I don't think as well on the golf course as I do when I'm sharp.

And, obviously, I'm pretty sharp when I start a day and by the time I end the day, if I'm not in good shape, it's a telling situation. As my father once said, the game of golf is a game that is played a great deal from your shoulders up.

* * * *

Q. Now, Mr. Palmer, we've talked about fatigue as a factor in professional tournament golf at the PGA Tour level. If a player—in your experience, Mr. Palmer, if a player were able to reduce fatigue during the course of a 72-hole round or even a single round of 18 holes by use of a golf cart, in your opinion, sir, would that provide that player with a competitive advantage over the players that were not permitted to ride in golf carts?

A. Absolutely.

Q. Why, Mr. Palmer, would the use of a golf cart by a player in PGA Tour competition provide a competitive advantage to that player over players who were not permitted to use golf carts?

A. Well, it's very simple. A man walking is using energy constantly as he walks. Sitting in a golf cart is a pretty relaxing way to go around a golf course, and you would probably keep a lot more of the stamina you have by riding versus walking.

Q. Mr. Palmer, as I understand it, in the—in the normal 18-hole round of golf at the tournament level, a player who

walks walks approximately 4 to 5 miles. Is that your understanding?

A.That is correct.

* * * *

Q. In your opinion, Mr. Palmer, is professional golf at the PGA Tour level one in which walking the course is a fundamental aspect of that game at that level of competition?

A. Absolutely. That's a part of what we look to when we start playing.

Q. And why is it fundamental to the game of golf at that level of competition, Mr. Palmer?

A. Well, again, because of your—part of the game is the physical fitness that you have built into your body so that you can compete at that level.

* * * *

Q. Mr. Palmer, you told us at the outset that you have played professional tournament golf at the highest levels, not just on the PGA Tour, but in professional tournaments around the world.

Do you know of any professional golf organization around the world that puts on championship competitions at the level of the PGA Tour that permits competitors in those events to use golf carts—

A. I do not—

Q. —during the courts of the competition?

A. —no.

* * * *

Q. Mr. Palmer, in your opinion, based on your experience, and particularly based on your involvement in the formation of the PGA Tour in the late 1960s, would the use of golf carts in PGA Tour competitions alter the nature of the game of golf at that level of competition?

A. Yes.

Q. Why do you say that, sir?

A. Well, because it would take the physicalness out of the game. And I think that is what—part of the tradition, integrity of the game.

Q. Now, Mr. Palmer, just a few more questions.

You've talked, Mr. Palmer, about the integrity of the game and you've indicated that in your opinion, the use of a golf cart would alter the integrity of the game at the level of the PGA Tour.

In your opinion, Mr. Palmer, would the use of a golf cart on the PGA Tour by one competitor or some competitors but not others, provide a competitive advantage to the competitors that used the golf cart in those tournament events?

A. No question about it.

Q. Why do you say that, sir?

A. Well, again, he would be—he could stay far more alert and avoid fatigue that naturally happens with exercise and walking. So it would be definitely an advantage to ride a golf cart.

Q. In your experience, Mr. Palmer, can cause fatigue be the factor in losing just one stroke during the course of a round?

A. If you lose one stroke for whatever the reason, it's—it's a bad—I've lost a lot of open championships by one stroke.

* * * *

Q.And is fatigue one of the factors that can cause a golfer at the PGA Tour level to lose one stroke or more?

A.Oh, it is. And it has happened.

Q.And can one stroke be the difference between winning and not winning a tournament at the PGA Tour level?

A.As I said, I've lost a few national opens by one stroke.

* * * *

Q. You don't know anything about his medical condition because you have not been provided with any of his medical records?

A. That's right.

Q. And the tape that I requested that you see of his condition was never shown to you?

A. That's right.

* * * *

Q. And to your knowledge, sir, has the PGA Tour in PGA Tour events ever made an exception to allow a competitor to use a golf court during a round of golf?

A. Not to my knowledge.

Q. Is it the case, Mr. Palmer, that golfers, from time to time, have had physical disabilities of one kind or another that have prevented them from playing a round of golf?

A.That is correct.

Q.And do you know of any instance, Mr. Palmer, where the PGA Tour has made an exception to its rule prohibiting carts so as to allow a competitor with a physical disability or infirmity to continue to play?

A. I do not know of any.

* * * *

Q. If golf carts were to be used by some competitors in PGA Tour events, Mr. Palmer, is it your testimony that that would change, fundamentally, the nature of the game at that level competition?

A. Absolutely.

* * * *

Q. Why would the use of golf carts by some competitors at the PGA Tour level of competition fundamentally alter the nature of the game at that level?

A. Well, I think that it would be definitely giving those people who are riding an advantage, and that would certainly alter the nature of the tour.

VIDEOTAPED DEPOSITION OF GERRY NORQUIST
January 12, 1998

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Q. All right. Let's take the use of a cart, first, before we get into walking. They're kind of intertwined, but it's easier, perhaps, to understand the difference.

First of all, what is your preference with respect to your play? If you were given an option to use a cart or walk, which would you take?

A. I, personally, would rather walk.

Q. And in connection with tournaments that you have played in where that option has been given to the players, have the majority of them walked?

* * * *

A. In my recollection, the majority of the tournaments I've played in where the option has been given, most players have walked.

Q. Okay. now, assuming that there were 168 players in this year's final and that they were given the—final qualifying school, and that they were given the option to ride if they would like, and that 20 or less used carts and the remainder of the field walked, do you have an opinion, based upon those statistics, as to whether or not the preference, generally, of professional golfers like you is to walk?

* * * *

A. I do have an opinion. The opinion, to me, is—and knowing other players that I play with on a daily basis, is about that percentage would say they would like to walk as opposed to riding a cart.

* * * *

Q. Okay. Is there any advantage—or disadvantage, rather, in determining the amount of wetness in the soil, how that might affect your next shot or the shots to come?

A. Yeah, I think when you're walking, you get a better feel for the golf course itself, you get a better feel for the ground conditions. As opposed to driving a cart, you'll get a better feel that way.

* * * *

Q. Okay. Is it—do you lose any type of relationship with the course by riding as opposed to walking?

A. My opinion is that you do, but I suppose—you could get used to it, but I just—inherent for me in playing the game has always been getting a feel for—for what I'm doing. And walking is, to me, part of that. I feel it, and I would rather walk.

It's—it's hard to explain. It's hard to be quantitative on it. it's just a feeling that I have.

Q. Sure. Now, in connection with your opinion and your statement about the fact that there are advantages to walking a course as opposed to riding, how about your blood circulation or circulation by walking as opposed to riding? Is there any—is that a factor in this?

* * * *

A. I would—for me, it's as—walking is—is fairly—it's not a huge aerobic exercise, by any means, but it does help me, I believe, when I walk to the ball, to get the blood circulating a little bit and to keep a little warmer, possibly. And I think it helps me from that standpoint. It keeps me looser.

* * * *

A. With what I know of Casey's situation—and I most recently had a chance to play with him in a practice round for the Long Beach Open in July of this year—oh, excuse me, of the past year, 1997, I find it hard to believe that anyone could do anything to give Casey a competitive advantage over me, personally. And I can only think of myself. I don't believe

Casey is able enough to have a competitive advantage over me because he's at such a disability.

So to me, riding in a cart—if Casey is riding in a cart, I don't consider that he's going to have an advantage over me. It's not going to make him a better player than me if he isn't already.

Q. Okay. Is he at a disadvantage as to you physically at the outset of the round without a cart?

A. Oh, there's no question. No question about it.

Q. What type of ground does he have the most difficulty handling? Is it the slope next to the green, or is it coming off the tee box, or what?

A. Again—that's probably a question you'd have to ask Casey. But as I observe him, any time Casey is on an other-then-level lie, he's got a challenge. Because golf is a game where you have to distribute weight, you have to transfer weight. And when Casey has to transfer his weight back to his right side, he's at disadvantage there because he doesn't have a strong enough leg to handle that.

Q. Okay. Can you think of any other aspect of the cart/Casey situation where it would be any way that it could be considered to be advantageous, knowing his condition as you do, having played with him 30 to 50 rounds?

A. That it could be advantageous?

Q. Yeah, to him as opposed to you. You've already indicated that it wasn't from the outset, but is there any other factor that would be important in this?

A. In my opinion, as it relates to Casey, no.

* * * *

Q. One of the—the factors that affects a professional golfer during the course of a tournament is fatigue, is it not, Mr. Norquist?

A. There are certain cases where fatigue certainly comes into play.

Q. Well, isn't fatigue a factor in every round of golf at the professional level to some extent or another?

A. Yeah, probably. There's mental fatigue and physical fatigue.

Q. Let's talk about physical fatigue for a moment and then we'll touch upon mental fatigue.

You would agree with me, would you not, that physical fatigue is a factor, to one extent or another, in every round of golf at the competitive level?

A. To one extent or another, I'd agree with that statement.

Q. And you would agree with, me would you not, Mr. Norquist, that fatigue can have an effect on how accurately you hit a shot?

A. Yeah, I'd agree with that.

Q. And you would agree with me that fatigue can have an effect on how far you hit a shot?

A. I would agree with that.

* * * *

Q. Now, I think you said—and correct me if I'm wrong—but I think you said that in the normal situation involving two able-bodied golfers in a professional tournament, the one who is permitted to use a golf cart would have an advantage over the other player.

A. I would say if—there were certain circumstances where, if player A and player B, being of able body were, in certain circumstances, the player who used the cart could have an advantage over the player who didn't use the cart. And on the other side of the coin, I believe strongly that there would also be possibilities where that could flip-side.

Q. Let's talk about the situation, Mr. Norquist, where the competitor that is permitted to use a golf cart, in your view, has an advantage over the competitor that does not have the

cart. You would agree with me, would you not, that one of the competitive advantages would be reduction of fatigue that a golfer otherwise experiences over the course of a full round of golf?

A. Potentially, yes.

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DEPOSITION OF W. WILLIAM CALFEE
January 13, 1998

* * * *

Q. What requirement is that?

A. Required to send us, I believe, two letters stating that he is competitive and—from a PGA professional that he Ia competitive and can, you know, play to a level that he thinks would allow him to earn a card.

Q. Has anyone ever been turned down because they didn't have a sufficient letter from a PGA professional?

MR. MALEDON: You mean for entry into the qualifying tournament?

MR. WALTERS: Yes.

THE WITNESS: I don't believe so, but I don't know.

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DEPOSITION OF TIMOTHY W. FINCHEM

January 13, 1998

* * * *

Q. Do you assume that it Is a disadvantage to Mr. Martin to not be able to use a cart?

THE WITNESS:I accept my understanding of medical situation and, again, I have not studied it as yet—is that short of using a cart, he is unable to compete in a multi-day tournament. So I—if that is in fact his position, I wouldn't argue with it. I would assume that that is in fact the case.

Q. And you would assume that—and, therefore, it would be a disadvatage?

* * * *

THE WITNESS: That it would be a disadvantage to him if he was forced to play without a cart, given that his medical situation might result in him being unable to finish 18 holes? Absolutely, it would be a disadvantage.

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DEPOSITION OF JAMES RAY WEBB
January 19, 1998

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Q. Are you aware, sir, as the Deputy Commissioner of the LPGA, why the LPGA requires walking in its competitions?

A. Yes, I am.

Q. What is that reason?

A. Because we feel like the walking is a part of the tradition of the game, and it's an essential or integral part of the competition that, you know, at a professional level that we're competing in on the tour.

Q. When you say that walking is an integral part of the competitions at the LPGA, what do you mean by that, sir?

A. I mean it is a part of the competition that we elect to make a part of our competitions on the LPGA tour, and I think that it requires a player to have the stamina and the strength to be able to deal with the elements that—whether it be a hilly course or flat course or what.

* * * *

DEPOSITION OF KERRY JOHN HAIGH
January 20, 1998

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Q. Is it correct, Mr. Haigh, that the PGA of America rule that prohibits golf carts in competitions are found in the hard cards distributed before the tournaments?

A. Yes.

Q. Mr. Haigh, can you explain to us why the PGA of America prohibits golf carts in the PGA Championship, the Ryder Cup competition, and the Grand Slam competition?

* * * *

A. The reason that we prohibit golf carts, or the reasons I think, one, is it has always been that way, and the reason—second reason is that from a fairness standpoint, that by the Rules of Golf, players should all be treated the same, and under the rules, the Appendix I, one of the rules that we have implemented in the past and currently implement is that golf carts are not allowed.

* * * *

Q.Is it true, sir, that the PGA of America has decided that walking should be part of these three competitions?

A.Walking has always been a part of the PGA Championship, as I stated, and continues to be so.

DEPOSITION OF STEVEN JAMES NOSLER
January 26,-1998

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Q. Your position is that Mr. Martin compared to an able-bodied golfer is at a physical disadvantage at the very start, correct?

A. Yes.

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DEPOSITION OF JACK NICKLAUS
January 27, 1998

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Q. Now, Mr. Nicklaus, let me ask you, based on your experience as a professional golfer over all of these years, to what extent does fatigue and stress enter into the elements that affect a professional golfer during the course of tournament golf?

A. Well, in my opinion, it enters up—enters into it a lot. I think that playing the game of golf, uh, is a game that requires physical stamina, being in condition, being able to play, being able to handle the stressful situations, and at the end of a tournament, uh, having those elements, being able to handle those elements and still be able to perform the golf shots.

* * * *

Q. Tell the court why you believe that a golfer who is permitted to use a golf cart would have an advantage on the PGA Tour over a golfer who is not permitted to use a golf cart.

A. Well, I think that the cumulation of stress, the cumulation of fatigue, the cumulation of the weather factors—put 'em altogether, and if you're sitting in a golf cart and you can ride from one place to the next, to the next shot, and have the rest between the shots, and you can—and, you know, stress, stress and fatigue destroy concentration, too. I mean, you know, you've got to concentrate on what you're doing, and that—and concentration takes a lot of energy. And when you're not expending energy, you know, walking and moving through a golf course, you—tends to destroy your concentration also.

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Q. In any of those events in which you have participated, Mr. Nicklaus, has the rule always been in those events that the competitors are required to walk?

A. Yes.

Q. Mr. Nicklaus, what is your understanding of the reason why in these competitive events, such as the PGA Tour events that you've participated in and the other ones we've mentioned, such as the U.S. Open, the Masters, the British Open, the PGA Championship and others, that competitors are required to walk the course?

* * * *

A. Well, in my opinion, physical fitness and fatigue are part of the game of golf.

* * * *

Q. Would you agree with me, Mr. Nicklaus, that professional golfers all bring different physical attributes to the game of tournament golf at the start of a tournament?

A. Absolutely.

Q. Now, you yourself indicated, Mr. Nicklaus, that you engage in some measure of physical conditioning. Do you do that regularly?

A. I do it regularly.

Q. Why do you do that?

A. So I have the ability to compete. So that my legs will stay in shape, so the rest of my body will stay in shape, so I have a cardio system that will stay in shape, so that I can—so that I can compete, so I don't fatigue, so that I can handle the stress of playing tournament golf.

Q. So part of the reason that you engage in physical conditioning is to combat the effects of fatigue that are a natural part of tournament golf competition?

A. That's part of it. And also, I have a degenerative hip, and I've got very significant bone spurs and growths on my right foot, which the combination of the two of 'em mount up to cause me a lot of fatigue by the end of a tournament, by the end of a round.

And I am still playing some on the regular tour and some on the Senior Tour, and if I wish to compete on the regular

tour, then I've got to stay in shape to be able to try to compete.

* * * *

Q. Do any of the opinions that you've given about fatigue and advantage of using a cart in order to eliminate the—or at least reduce the amount of fatigue in competing with other competitors, do your answers, your opinions you've given to Mr. Maledon, do they relate at all to Mr. Martin?

A. No.

Q. Okay. Now, so are you saying that you do not have an opinion as to whether Mr. Martin would be at a competitive advantage if he were provided a cart?

A. I'm saying I don't—I didn't think that, uh—the issue is—you're talking about Mr. Martin. I was talking about the game of golf in general.

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DEPOSITION OF WILL F. NICHOLSON, JR.
January 27, 1998

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Q. Now, based on your involvement with Augusta National and the Masters golf tournament, and particularly your service as chairman of the Rules Committee of Augusta National, did you come to learn, sir, what the reason is that Augusta National has prohibited the use of automotive transportation by competitors during the Masters golf tournament and instead has required competitors to walk?

* * * *

A. We believe very strongly, in a championship such as the Masters Tournament, which is golf at its very highest level, it's—the purpose is to test, under 72 holes, the skills of the competitors in that event; it's to test their ability to make shots; it's to test their ability under stress and fatigue; also to test their ability to execute shots under the physical and mental conditions that may happen; also to do it under the conditions of weather that may present themselves. It's an integral part of the test. And the key is to have everyone tee off on the first hole under exactly the same conditions and all of them be tested over that 72-hole event under the conditions that exist during those four days of the event.

* * * *

To what extent, sir, is the element of fatigue and stress as you've described it a factor that is an essential part of the competition at the Masters Tournament?

A. Oh, I think, with specific reference to the golf course in Augusta, the element of fatigue is one that becomes very apparent. Because although it may not look like it, there's a lot of hills and you go up and down, and if you're constantly going up and down and regaining—and losing and then regaining altitude, there is a significant amount of fatigue factor that may come upon someone during walking those 72 holes that may affect the swing of the golf club on the last couple holes, may make the difference between winning and coming in second, third or fourth.

VIDEOTAPED DEPOSITION OF
FRANK WILSON JOBE, M.D.
January 28, 1998

* * * *

Q. Would you explain to the Court the extent to which you engage in consulting with and advising, athletes regarding physical condition and fitness.

A. I'm considered the team orthopedist, consultant, for a number of teams. The major—excuse me—the major two areas that I work in are with the baseball Dodgers, and with the PGA Tour, golfers, and then I also advise the Angels and the Ducks, that's hockey, and the Kings, hockey, and the Lakers, basketball, at this time.

* * * *

Q. Now, Doctor, would you agree with me that in virtually any athletic competition, particularly those that you are familiar with that you had mentioned such as golf and baseball and basketball and others, that the athletes in those competitions bring to the competition different natural physical attributes?

A. Yes, they do. That's why some people win more than others, I think, is some of them have more ability than others. Some of them have a better capacity for developing endurance, and that's a condition that is very hard to quantify. You can't very well say that this is the level of endurance and everybody has to meet this level.

Q. To what extent, Doctor, does the factor of fatigue, physical fatigue, and stress affect the performance of an athlete?

A. Well, I think it's very important. That's why the athlete who has exercised and overloaded his muscles in the trailer or on his own or with his trainer, when it comes to the long tournament on the weekend where he has to walk maybe 20, 25 miles, toward Sunday afternoon, when he is toward the

end of the—of the tournament, the muscles do not work as well as they did on the first day.

* * * *

Q. Now, Doctor, turning to golf again for a moment: Do you have a. opinion based on your knowledge and experience and particularly your work with professional golfers, do you have an opinion as to whether the use of a golf cart reduces the effects of fatigue and stress that a competitor in a four-day, 72-hole golf tournament would otherwise experience if he were required to walk the course during the tournament—

* * * *

THE WITNESS: The answer is yes.

Q. And what is your opinion, Doctor?

A. I think that the use of a cart reduces the amount of stress that is countered against your amount of endurance, so that by Sunday, you probably would not be as fatigued as someone who had walked the course.

Q. And explain to the Court, if you would, in a little bit more detail, why from a medical standpoint based on your experience that would be true.

A. Well, I think that endurance is a hard thing to quantify, but everybody has a certain amount of it and you can increase it by exercise. Overloading your muscles prior to the contest for a period of time increases your ability to do certain physical activities.

As you get close to the end of your reserve, the body doesn't function as consistently as it does early on in your expense of the energy, so that, for example, if you could hit all of your shots on the first day and be very consistent and not shaky at all in your putting and your driving, and as you reach the point where your fatigue is getting close to the end of your endurance, then you become a little bit shaky, and the recruitment of different muscles in the shoulder and back and

legs isn't as consistent so that your accuracy and consistency of shooting and putting is not as good as it was on Thursday.

Q. Now, Doctor, do you have an opinion, based on your knowledge and experience, and particularly, again, your work with professional golfers, as to whether a golfer using a golf cart in a four-day professional tournament has a competitive advantage over competitors who are required to walk the entire tournament?

* * * *

A. Yes.

* * * *

Q. And what is your opinion, Doctor?

A. My opinion would be that they would not have expended as much of their energy reserve, their endurance, as someone who had done all the walking.

Q. When you say "they," you mean—

A. The person in the cart.

* * * *

Q. And in connection with my client, then, Casey Martin, I take it that you are telling the Court that you don't anything at all about his leg condition?

A. That's correct, uh-huh.

Q. You don't and have not tested him or examined him?

A. That's correct.

Q. And you don't his level of stamina?

A. No, I don't.

Q. And you don't whether he can run as an aerobic conditioner?

A. I do not.

Q. And you don't if he can or cannot jump?

A. I don't know that.

Q. And you do not know the amount of effort it takes him to operate and get in and out of a golf cart? You would not know that?

A. I would not.

Q. And you would not know his level of fatigue at the end of the third or fourth day of a golf tournament?

A. That's correct.

* * * *

ARGUMENT TO THE COURT, JANUARY 26, 1998

[21] THE COURT: Well, if you are exempt from the ADA, you are also exempt from the Civil Rights Act, correct?

MR. MALEDON: That's correct. They are one and the same. The test is the same, and that is correct.

THE COURT: And not that the PGA Tour would ever do this, but hypothetically, then, you would be arguing that you could lawfully ban golfers based on race or religion?

MR. MALEDON: Any private organization unfortunately, Your Honor, can do that, and the PGA Tour has never done that.

* * * *

THE COURT: But hypothetically, if the private club exemption [22] applies to you, you would also assert that you could lawfully do that.

MR. MALEDON: Your Honor is hypothetically correct that that is true as to any private organization, a country club, a—the Boy Scouts, anybody that qualifies for an exemption as a private membership organization, that is correct, Your Honor, they are exempt from the civil rights laws. In my view that's—that's one of the unfortunate aspects of what Congress did, but that's what they did, and that's what the law is. So Your Honor is correct.

THE COURT: And you don't think that the participation of the public in the PGA Tour and what they do in terms of generating economic benefits for its members would be such that the courts would not deem PGA Tour to be private under the Civil Rights Act?

MR. MALEDON: No, Your Honor. No, Your Honor, not any more than the same thing is true with respect to the Boy Scouts and the money that they raise. I submit that the Boy Scouts of America probably have as much if not more assets than the PGA Tour, but nevertheless, the courts have held that they are a private organization exempt from the Civil Rights Act.

* * * *

TRIAL TESTIMONY
[67 D. Jones-X]

Q. And could you tell the court the—sort of a shorthand rendition of what the diagnosis is in this case?

A. Casey has a rare congenital vascular malformation which consists of three things. It consists of abnormal vessels under the skin which are called cutaneous capillary hemangioma, birth marks, if you will, port-wine stains. He also has bony hypertrophy, which simply means enlargement of the bone, and in his right lower extremity, his right leg is longer than his left as a result of his condition. And he also has venous malformations in the right lower extremity which is in the form of varicosities which involve the skin, the muscle and the bone in the right lower extremity.

* * * *

[93] D. Jones D

* * * *

Q. Can some of the danger be removed if he's allowed to ride a cart as opposed to walking?

A. I think this is a progressive problem, and I'd certainly like to see Casey with his leg elevated as much as possible. The engorgement of the bone with blood is one of the problems created which creates the resorption of the bone.

Q. Does he have instructions on his person as to what [94] action should be taken in the event of a fracture?

A. Well, actually I made him a small card to put on his golf bag that at least explains his problem so that it he should break his leg at a golf site that they would have some idea of the underlying problem.

Q. All right. Now, can you tell the jury, if he is at risk on uneven terrain that's frequently seen on golf courses, if he walks as opposed to rides, some of that danger is eliminated if he's permitted to ride?

A. Yes, it is.

* * * *

[99] In Summary, Your Honor, the medical records reflect a 25-year old male with a rare congenital vascular malformation of the right lower extremity which has led to, number one, chronic pain secondary to vascular engorgement and progressive loss of bone stock, pain so severe that he has at least considered to explore the use of time [100] contingent narcotics; number two, a documented sleep disorder secondary to chronic pain which leads, according to Dr, Holmes, to an exhaustion syndrome; number three, the need to wear two compression stockings at all times; number four, it has resulted in marked muscular atrophy and weakness in his right calf; number five, it has affected his knee through multiple intra-articular bleeds, causing abnormalities which are painful; and. number six, and most important from the orthopedic aspect, it has resulted in a weakened tibia which is at risk for fracture and potential limb loss and/or serious post-fracture complications.

* * * *

[112] D. Jones-X

* * * *

Q. Doctor, do I understand your testimony correctly that playing golf is a—is a serious risk to Mr. Martin's safety?

A. I think walking across the street is a serious risk to Mr. Martin's safety at this point.

* * * *

Q. That playing golf is a serious risk to Mr. Martin?

A. I think Mr. Martin's leg at this point in time is at risk for fracture with virtually any activity. In other words, a twist, stepping off a curb, someone running into him. I have a great deal of concern about it at this point.

Q. And those concerns are an increased risk of the fracture of his leg, as you've told us?

A. Yes. Correct,

Q. And an increased risk of possible amputation if that were to happen?

A. That's certainly a possible potential end result of such an accident, yes.

Q. Is there, Doctor, danger to Mr. Martin from getting in and out of a golf cart as he plays golf?

[113] A. Yes.

Q. And I take it that the golf cart doesn't protect him from that danger. If the danger is there, it continues to exist?

A. I think it decreases his danger. I think he has a greater chance of injuring his extremity walking up and down the fairway, stepping in a pothole, having a fan bump into him than riding in a golf cart, but the actual act that you ask of getting in and out of a golf course does render him susceptible to injury if it's done inappropriately.

Q. So playing golf even with a golf cart does increase the risk to Mr. Martin's physical well-being, is that what you are telling us, Doctor?

A. I'm telling ~~you~~ that playing golf in a golf cart decreases the risk of his susceptibility to injury.

* * * *

[119] D. Jones – Re D

Q. In the event of the amputation, would it be below or above?

[120] A. If it was necessary today, it would be below the knee, but there's a possibility with the changes in his knee it would eventually be above the knee, as well.

* * * *

TRIAL TESTIMONY

[213 E. Johnson-D]

Q. Okay. Well that's admirable. Can you tell the court whether you prefer to walk as opposed to ride a cart when that option is available , and if you do prefer to walk, why.

A. I prefer to walk, probably for a number of reasons. One, it's how I've played golf most of my life, and it keeps me in a rhythm. There are times when I would prefer [214] to walk because the temperature outside is such that if you are in a golf cart, the wind chill factor drops when you are riding in it and you are too cold. Weather's a real large contributing factor in walking. I would much rather walk if it was raining because I'm able to stay under my umbrella and not get as wet, my equipment stays dry, those types of things.

Q. All right. Are you better able to get the feel of the course when you walk as opposed to ride, or do you know?

A. You get a full effect of the elements. Everything from change in wind direction from one part of the fairway to the other, to being able to watch what the flag stick's doing on the green, to walking down the fairway versus being in the golf cart trying not to run somebody over.

* * * *

[222] Q. Now, there may be some testimony in this case that officials of the PGA Tour can transport players who have hit a ball out of bounds or who have lost their ball back to the tee to hit their next shot and then back again.

A. Yes.

Q. Have you seen that?

A. I've seen that and been involved in that.

Q. All right. So—So it's just not that there can be shuttles between green and tee where there's a long distance, but if you've lost your ball and you are in the play of the game, right in the middle of the hole, and you've hit a 285-yard shot, you've lost your ball, you can't find it, an official can take you

back by automated cart and take you back to the tee; is that correct?

A. That is correct.

Q. Then you hit your ball, and let's say that you fire this one straight down the fairway. Can the official then take you right back down to the ball that you've hit?

A. That's his discretion, but in most cases they will, yes.

* * * *

[229] Q. All right. And does any part of a golf round cause you to work up a sweat? I realize that the nervous energy and being under pressure would. But insofar as the physical aspect of the game, does it create any problem for you?

A. Not more than the temperature outside would cause a [230] person to sweat just standing there or cause a person to be very cold just standing there. There are—There are cases and instances where we play golf courses that are hilly where you might have to walk up a hill and you would be more exerted when you get to the top of the hill than if you were walking on a flat surface or downhill. But because of the pace of the play and our preshot routines, we know not to hit when we are winded or we know not to hit until we are ready to hit the golf ball. So I can't think of a time in my golfing career where I've ever hit a golf shot where I've felt that I wasn't ready to hit.

* * * *

[234] Q. Do the United States Golf Association rules as promulgated or published govern the rules of play at the college level?

A. I understand that they do.

Q. Do the United States Rules of Golf as promulgated by that organization govern play at the Nike Tour level?

A. Yes, they do.

Q. And do the United States golf rules apply to the PGA Tour level?

A. Yes, they do.

* * * *

[237] Q. All. right. Now, the tournament director in the Nike Tour and the rules committee has, according to exhibits that have been or will be received by the court in this case, discretion to allow cart use, and you've indicated one example where they can transport you back and forth while in the middle of your round, the ball is out of bounds, the ball is lost. Can you tell the court in other instances where the —where the you have been accommodated by cart use in your career as a professional touring pro?

A. The one that I can think of that is the most common is when we have a—a long walk or distance between a green that we've just finished playing on and the next teeing ground

Q. Is that known as a shuttle?

A. Yes, it is.

Q. Now, do you know—what—do you know why you are allowed to be shuttled if walking is a part of the game at that level?

A. In making a—I've never thought, given it, really, a second thought. I've always, in most cases, assumed that we had the shuttle for pace of play.

Q. That's so you can keep up with the groups and so forth?

A. Correct.

[230] Q. Okay. But it does kind of accommodate the players in a way, doesn't it, because you don't have to walk long distances?

A. I guess it would accommodate them from a sense of keeping the pace of play a little quicker so we are not out there as long.

* * * *

[239] Q. Okay. Now, do you consider walking is required as part of the stipulated round to be a fundamental of the game of golf or an integral part of it, or do you consider it to be simply an incidental thing that's required by the local conditions of competition?

* * * *

A. I consider walking as part of the game only as the purpose to get to the next shot, and it's a purpose to get a yardage to hit my next shot.

* * * *

[257] E. Johnson-x

Q. And if I understand your testimony correctly, you indicated that among those things were the stance, the setup, the swing. Is there anything else, Mr. Johnson?

A. That is fundamental towards the game?

Q. Fundamental to the game of golf as you've testified. Anything else?

A. Umm, I guess the only other thing would be the yardage.

Q. You have to be able to hit the ball, right?

A. Correct.

* * * *

[272] Q. All right. Now, Mr.—Mr. Johnson, you would agree with me, would you not, that an individual such as yourself who walks 20 to 25 miles over a golf course over a period of four days expends a degree of energy in doing so?

A. You would expend a degree of energy while doing so, but you would regenerate it.

Q. You would regenerate it by sleeping at night? Is that what you are saying?

A. Or standing.

Q. Okay. But without quibbling with me.

A. Right.

Q. You would agree that walking 20 to 25 miles, even for you, is something that causes you to incur some measure of fatigue, correct?

A. To honest with you, I've never given it any thought. I mean, to answer honestly. Sure, anything you do expels different types of energy I've never considered physical fatigue in it.

* * * *

COLLOQUY WITH THE COURT DURING TRIAL

[327] MR. MALEDON: I think the issue there, Your Honor, would be a factual one as to whether or not the—the caddie, the second caddie, was really providing any kind of advice or whether the second caddie was just an interpreter, if you will. Again, setting aside for a moment whether or not the ADA applies within the—inside the ropes.

I think the issue you're not dealing with is the very one we've said remains to be resolved in this case, and that is would the requested waiver of the rule fundamentally alter the nature of the competition. And that's a factual issue, as it is here. As to whether or not it's a—it's a situation that would compromise the competition.

Certainly if the second person out there, in addition to the blind caddie in your example, is providing advice and assistance separately, I think it would violate the rule. But if in your example all the second person out there is doing is interpreting the sign language of the blind caddie, then I can't imagine it would be interpreted as—as violating the rule that you get assistance only from your caddie.

I don't think it would be any different in that situation, Your Honor, than, you know, if you—if you had [328] a caddie that was hard of hearing and used a hearing aid to hear what the golfer was saying to him. Again, you're dealing with just one caddie, so you'd have to look at exactly what is happening in your example.

In our situation, what we know is that there's a rule of the PGA and Nike Tour that requires the competitors to walk. And the issue I believe before Your Honor is simply this, and only this. Is that a substantive rule of the competition? If you require waiver of that rule for Mr. Martin or anybody else, does it alter the competition in any way.

* * * *

TRIAL TESTIMONY
[332 R. Murphy – D]

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Q. Okay. Could you tell Judge Coffin if there have been significant changes in the traditions of the game over the last 40 to 50 years? And if so, what have those changes been that you deem to be most significant?

* * * *

A. The US Open is no longer a 36-hole final. That was a rather dramatic decision that was made back in the Sixties.

The Senior pros ride carts now.

The stymie rule has been eliminated from the game. That was a—certainly a strong point of the game for many, many years.

* * * *

[335] Q. All right. Now, in connection with walking and its. relationship to the game, what do you consider with respect to that **as** to whether or not that would be an incidental of the game or integral to it?

A. Well I—I think walking adds to the joy and pleasure of the game. It certainly does for me. At many golf courses now you're required to take a cart. And I always try to find somebody else who will drive, and I put my bag on the right side and I walk as much as I possibly can. I think walking adds to the joy and the pleasure of the game. I wouldn't call walking an: integral part of the game. I don't think that golf, you know is known as a physically demanding sport, and, you know, the way cross country running would be or some kinds of a track and field event or triathlon. It's—I think walking is the pleasurable part of the game. I certainly enjoy it. And I think that young Mr. Martin certainly misses, and I think he would walk, God given his ability to do so.

* * * *

TRIAL TESTIMONY
[353 W. Goodwin – D]

* * * *

Q. All right. Now, can you tell the court, is it important that, in college competition, that all the players play by the rules?

A. Yes, sir. Of course.

Q. And do they have, in college competition, a rule that prohibits the use of a motorized cart and compels golfers to walk?

A. They have a—they have a rule, but it has exceptions.

* * * *

[355] Q. All right. Did you make a written request on behalf of Casey Martin to the PAC-10 coaches?

A. I didn't, sir. But the Stanford University did.

Q. Was it voted on by the coaches?

A. I don't know that I have any—no, no. When you [356] apply to the PAC-10 conference, the conference voted on that. The conference executives.

* * * *

Q. All right. In any event, it was approved one way or the other, whether it was conference approval or coach approval?

A. Yes, sir, that's correct.

Q. All right. And what happened at the next level at the NCAA championships? Did Mr. Martin participate in those on behalf of Stanford University?

A. Yes, he did.

Q. Was there an application made for him to participate in those championships using a cart?

A. Yes, there was a letter written from Debbie Corum, who was one of the officers in the athletic department at Stanford University, requesting that privilege.

Q. All right. And was that—was that request granted?

A. Yes, it was.

* * * *

[359] Q. Was there any complaint ever made to you by the coaches when he was allowed a cart that that gave him a competitive advantage over the—

A. Any complaints? No sir, there were exactly—exactly the opposite. Everybody recognized Casey for the person he was, and what he was doing with his life, and every coach, to my knowledge, and every player wanted Casey in the tournament and they welcomed him there.

Q. Did anyone contend that that constituted an alteration of the competition to the extent that it didn't constitute the game to your level, the college level?

A. Not at all, sir.

* * * *

[363] W. Goodwin – X

* * * *

Q. Okay. If you showed up with your Stanford golf team to play the University of Arizona and you saw the members of that team with golf carts and you were told when you showed up that the University of Arizona was going to use golf carts but Stanford and its team members were going to walk, you'd object to that, wouldn't you, sir?

A. Not at all. I'd like to beat them in the carts.

Q. I'm sorry. What was your answer?

A. I say I would not object at all. I'd like to see if we could beat them in their carts.

Q. You would like to see if you can beat them in their carts?

A. That would be exhilarating competition for me.

Q. And you wouldn't have any objection to the other team participating in golf carts while your team walked, is that what you're telling the court?

A. I would have none.

* * * *

[366] A. I don't—I don't know that for sure. I have played a lot of tournament golf myself over the years and always felt it was a huge disadvantage to have to ride around in a cart. So I can't answer that exactly.

* * * *

* * * *

Q. Okay. Now, does it qualify in its nature, would it be qualified as an exercise, the game of golf?

A. If you look at the energy expenditure, which is the manner in which you can get some sense of that, the amount of calories consumed in a period of time in walking is roughly in the vicinity, at a reasonable pace, is roughly about six calories per minute, which translates out into somewhere in the vicinity of about 100, maybe—about 80 to 120 calories per mile.

Golf is, according to the references that I looked, falls in that category. So I would suspect if one considers exercise as —excuse me, walking as an exercise, then I suspect golf might also be. The difference is that in walking, it's usually calculated to be a continuous activity. And certainly in the— my understanding of golf is that it's not continuous.

* * * *

[399] G. Klug - X

Q. The subsidiary definition of fatigue in the dictionary is, quote, temporary loss of power to respond induced in a sensory receptor or motor organ by continued stimulation. Do you agree with that?

A. Yeah. Um-hm.

* * * *

[399] agree—I would agree with it.

Q. Okay. And if I'm understanding this correctly, Doctor, the second definition or the subsidiary definition of fatigue means that when a—when a muscle is fatigued, it tends to lose power or the ability to respond as it would if it were not fatigued, correct?

A. If we're talking specifically about muscle, yes, um-hm.

* * * *

[400] Q. Okay.

Now, Doctor, you would agree with me, would you not, based on your background and experience , that a person that walks four to five miles experiences some measure of fatigue?

A. No, I wouldn't agree with that.

Q. You wouldn't agree with that at all?

A. No, I would not.

Q. No fatigue at all?

A. I couldn't—You asked me if I agree with it. I couldn't agree with it unless I knew something about the other factors involved. For example, how long did it take, how large is the individual, how heavy—excuse me, what kind of fitness level the individual has. It's too much—it's too general of a statement for me to be comfortable with giving you a firm conclusion on that.

* * * *

[402] Q. All right. And if I understand your testimony, sir, I don't want to get bogged down in your clinical definition of fatigue, but as I understand your testimony, you would agree that you cannot quantify scientifically to any degree of medical certainty the precise amount of comparative energy that is being expended by one person performing that task as opposed to a second person performing that task, is that right?

A. I would agree in practice you couldn't do that.

Q. In other words, you'd need to know all the other factors relating to the person's physiology, the person's ability to cope with mental stress, physical stress, all the other factors you've talked about, is that right?

A. No, I wouldn't agree with that. I thought what we were talking about is the physiological aspects of caloric consumption. If I could have those six measurements there, I believe I could do that. The stress related to the work done is not the issue. It's—the stress is related to the overall feeling of fatigue. So no, if I had those—[403] if I could calculate those

six things, I would ,feel reasonably comfortable that I can make a pretty good calculation of energy expenditure.

Q. And have you ever done that, Doctor?

A. You can't do it.

Q. That's my point. You can't do it, can you, Doctor?

A. No, you can't. I think I've testified that you can't do it.

Q. Right. Well, maybe I didn't make my question clear, then, Doctor. Let me restate it.

What you're telling me is that somebody who walks 25 miles over a period of four days expends a certain amount of energy. And if two people do that, you're telling me that scientifically, to a reasonable degree of certainty within medicine, you can't calculate the differences, isn't that right, Doctor?

A. I think that's what I've said, yes.

* * * *

[407] Q. I think if I understood your testimony correctly, Doctor, that you said that it was not possible to determine the comparative levels of fatigue between a golfer who walks and a golfer who rides, is that right?

A. That's what I said, yes

Q. Okay. In other words, what you mean by that, Doctor, is that if one golfer rides in a golf cart throughout a round and another golfer walks the 18 holes, you can't determine the comparative level of fatigue or the comparative level of energy that's being expended by those two separate individuals?

A. That's correct.

* * * *

TRIAL TESTIMONY
[413 G. Klug-ReD]

Q. Is there anything to the fact that there's any type of cumulative effect going on by 18 holes the one day, the next, the next, for golfers?

A. I have no data to answer that question. My professional opinion is no.

Q. It doesn't make any—make any—that that's not a factor?

A. Not an activity that represents as low of an energy expenditure as golf. If we're talking about consecutive basketball games, consecutive marathons, my answer would be different. But for golf, no.

* * * *

TRIAL TESTIMONY
[416 K. DeRocher-D]

Q. All right. Now, can you tell us whether carts are allowed in competition in the PGA of America?

A. Yes, they are

Q. And do players have the option of either riding or walking?

A. Yes, they do.

Q. And is there a general preference amongst professional golfers of your age and stature that have a preference with respect to walking to riding?

[417] A. Of the players that I've observed, most would like to walk and prefer to walk.

Q. What is your preference?

A. I prefer to walk.

Q. Why do you prefer to walk?

A. I think that walking gives you quite bit of an advantage. One, the pace of play when you walk, you kind of set your own pace. You kind of get into a rhythm of walking, you're able to, I think, observe the elements more so than when you're on a cart. On a cart you're kind of zipping from one place to another, trying to figure out where the cart has to go, who do I have to physically not run into.

Whereas, where you come up from the green, where you're able to walk from the fairway and up to and onto the green, you can get the feeling of the lay of the land. How does the green sit, whereas if you're in a cart usually you have to take the cart well around the back of the green on the cart path and come from the opposite side and so you don't get the advantage to see the typical terrain of the green, does the green tend to slant one direction or another.

* * * *

[421] K. DeRocher – x

Q. Now, Mr. DeRocher, for the court's benefit, can you explain the difference between the PGA of America and the PGA Tour, if you know, sir?

A. The PGA of America is for club professionals. In [422] other words, you can kind of distinguish the two between what people might say is professional golfers and golf professionals. PGA of America is for golf professionals. PGA of America is for golf professionals, people that work at going courses, that run golf course facilities. The PGA Tour is for golfers that golf for a living. In other words, they earn their living by playing in tournaments and winning prize money.

Q. Be fair to say that the difference is that PGA of America professionals work at country clubs and at golf courses, whereas professionals on the PGA Tour are touring professionals

A. Yes, sir.

* * * *

TRIAL TESTIMONY

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[434 R. Ferris – D]

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Q. Sure. Prior to 1997, sir, was it required that competitors in the PGA Tour qualifying tournament walk the course?

A. To the best of my knowledge, it was not required.

Q. All right. And what happened in 1997 at the board level Mr. Ferris , that brought about a change in that requirement?

A. The feel was on the part of staff and was brought to [434] the board—by staff, I mean the commissioner and the staff—was brought to the board that they wanted to make some improvements to the final stages of the qualifying tournament and, to the best of their ability, to approximate playing conditions as encountered—that the players would encounter at the—out on tour, out on the PGA Tour once they got their card and they would be out on tour. And so they took a number of actions, and which the board approved, to—to create a situation where we mirrored PGA Tour-like conditions at qualifying school, and I believe that one of those actions was to cease to have the use of carts and to put in place that in the finals, I think it's the final, that you must walk.

There were a number of other things done, too.

Q. What's your understanding, Mr. Ferris, as to why competitors in the qualifying tournament in prior years were not required to walk the course?

A. It was a matter of basically practicality. And for the most part, economic practicality. The qualifying tournament is a—it starts out with 1100 people, and it's a series of tournaments and you have the first round and then you have the second round. It's a winnowing down. You start with 1100 arid you winnow it down and you go to the second

round. Then you go from the second round into the finals. I believe that's the series.

[436] And in many of the locations where we played the first and second rounds, the quality of the golf courses wasn't as good, the availability of caddies, not always available, hard to come by. Also from the fact, and this has been a personal concern of mine over the years, is the cost of going to qualifying school is pretty expensive, and for many fellows, they couldn't afford a caddie. It was too expensive to bring their caddie, bring them into the town and be able to pay for it.

So I believe the way they had it was you could always use a cart in those, or you could bring a caddie. You could take your choice. And that's what was done in round one, round two, and then we had this discussion about the final round. And it was, well, this is going to be the final round. Let's make it like life is out on tour. Let's make it as exactingly as life is, so the quality of the course, make sure it's meticulous, make sure we are playing at the lengths, make sure the pin positions are tough, make sure that the greens are fast and let's walk. There's a number of issues.

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[438] Q. And what did the requirement of walking the course in the finals of the qualifying tournament have to do with replicating the conditions that a competitor would find out [439] on the Tour?

A. Because that is a condition of the competition. I think it's an integral condition of the competition that is required on tour and has always been required. That walking is part of the competition. Walking is part of—of what makes golf. It's—I don't know about you, but if—when you walk, if it's—if it's a hilly course, if it's a long day , the thing that makes golf are your legs, your action through the ball. At least many people think that's what makes it. And at the end of an 18-hole round on a hot, humid day there can be—legs, walking, fatigue is a

factor. It can be a factor. Is it always a factor? Probably not. Can it be a factor? Very definitely.

So the whole purpose here is that it's an integral part of the competition at the highest level. And I think that's important. What I play as an amateur golfer, I play in my club, club events, has no relationship to what occurs out on the PGA Tour. And as I think I spoke earlier, when I play with some of my friends on the tour, like Curtis Strange or Jay Haas. They've got to give me my eight shots, plus six or so more, so we can have a fair game. And that's the difference in the skill level. And what they can do with the ball, well, it's just amazing.

So I guess what we were trying to achieve were conditions that were—that mirrored PGA Tour conditions [440] in all aspects.

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[442] Q. And did it come to your attention at some point, Mr. Ferris, that the—I take it it did as a result of the preliminary injunction, did it come to your attention that the commissioner had turned down Mr. Martin's request to use a cart in the finals of the qualifying tour; is that correct?

A. That is correct.

* * * *

[462] Q. Well, I want to get to the history of it, sir, and I think I know what you are leading up to, but if you could just for the moment just tell the court, if you would, why the Senior PGA Division Board does not require the competitors in Senior PGA Tour events to walk the course.

A. It's an economic matter, because if Arnold Palmer's got an arthritic hip and he can't walk 18 holes and we want Arnold Palmer out there playing because he's good for 5,000 more people to show up at the tournament, he's a draw. He's an economic draw. That's why you allow them to use carts, because it's a nostalgia tour. It's the names. It's these people who have—who have deported themselves over a period of

years and have earned the respect of their fans and the admiration of their fans, Arnie's Army, et cetera, Lee's Fleas, all sorts of things like that. And these people want to play with those people.

So that's the reason why carts were part of the competition on the Senior Tour.

Q. Now, Mr. Ferris, you told us earlier, sir, that the PGA Tour considers walking the course to be an integral part of the competition for PGA Tour, regular PGA Tour and Nike Tour events.

[463] Q. Does the PGA Tour consider walking the course to be an integral part of the competitions for Senior PGA Tour tournaments?

A. No, we don't.

Q. Why not?

A. Because the—Well, the basis of the tournament is different. It's not golf at its highest level. Everything we do on the Tour, on the regular tour and on the Nike Tour, is golf at its very highest level. The way we—I've talked about it ad nauseam about the way we set the course up, everything we do is to produce that week the best person in golf.

Golf on the Senior Tour is, as I said, a nostalgia tour. Yes, it's competition, but it is also a marketing vehicle for people to see older players, players who may have physical disabilities that don't allow them to be out there unless they had a cart. So the whole purpose of permitting the cart is we don't consider it the basis of that tour to be golf at its highest level. We consider it to be a combination of nostalgia and competition.

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[473] R. Ferris-X

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Q. And the purpose of that competition is to determine who are the best players who are applying for that position and pick the best ones to have them on your tours; is that right?

A. The competition picks them.
Q. Right?
A. Yes, that is correct.

* * * *

[472] Q. Well, in that approximately 20-year period between 1968 and 1997, players were permitted to use carts, weren't they, in all phases of the qualifying tournament?

A. To the best of my knowledge, that is a correct statement .

Q. And then in 1997, when you made this change, you were still going to get players down, whittle down from the approximately 1100 that apply down to the 168 in the final stage, permitting them to use a cart, weren't you?

A. In phases one and two we were going to allow the use of carts, as I explained before, due to—and this goes back to your highlighting this, as closely as possible. Due to the fact of—of economics, due to the fact, i.e., the caddies, getting them there, bringing them there, a lot of the young people couldn't afford them. The other thing is they weren't available at the local sites, couldn't get enough caddies. So for those reasons, carts were allowed.

And it was part of the winnowing down process. You know, there are a lot of people that have the Walter Middy dream, and they are willing to pay the 4,000 just for the fun of going and trying.

* * * *

Q. Well, if you could answer this question.
[476] A. Sure.
Q. In 1997 when you made this decision—
A. Right
Q. —you decided that you didn't need to test walking for the —to get the people down from 1100 down the 168, did you?
A. It was an economic decision.

* * * *

[490] Q. All right. Now, I want to talk to you about the Senior Tour that you've had some experience with.

Am I right that the Senior Tour has been called by many in the sports world the most successful sports venture of the 1980s?

A. I think that's a correct term, yes.

Q. And the Senior Tour includes 78 of some the most talented golfers in the world, doesn't it?

A. No. The Senior Tour includes 78 of some of the used-to-be most talented golfers in the world. They are still talented, but they are not nearly as talented as the young people that play on the regular tour or the Nike Tour.

* * * *

[491] Q. Now, in fact, you've publicly advertised the Senior Tour players using the slogan, These Guys Are Good.
A. They are.
Q. And when the Senior Tour started in 1980, by 1986 when you were on the Senior Player Division Board, it had grown in stature beyond all expectations; is that correct?
A. That is correct.
[492] Q. And it had done so with players using golf carts, hadn't it?
A. That is correct, because it was a nostalgia tour.
Q. It had been able to establish its stature with players using golf carts, hadn't it?
A. It was a different form of competition, yes. It was a different form of competition, where you were playing for the pleasure of playing with one of your heroes, just like people go out and play with the Cubbies in Chicago. The old Cubbies, that is.

* * * *

[493] Q. And then it was in—after 1985 when you got the televising of your tournaments, it was in January of 1986 that

Mr. Arnold Palmer first raised the issue at a board [494] meeting and argued that carts detracted from the public image of the tour; is that correct?

A. Are you reading from something so I can just accept it without having to look at it?

Q. I was reading from Mr. Palmer's testimony.

A. Oh.

* * * *

[495] Q. Now, these are the minutes where Mr. Palmer first raised the issue?

A. I believe that's correct.

Q. All right. And it doesn't say anything in those minutes about Mr. Palmer wanting this to be conducted as a physical competition, does it?

A. I wish I was a speed reader.

These minutes do not reflect that, but I can tell you in the discussions I've had with Mr. Palmer over the years, that's exactly what he means. Minutes don't always completely and accurately reflect everything that took place in a meeting.

* * * *

[496] Q. At the time you made—Mr. Palmer came forward with this proposal, you suggested that what should happen is that carts should be banned and medical exemptions given; is that correct?

A. Yes, that is correct.

Q. And you were going to allow any player with a bona fide medical certificate to use a cart; is that correct?

A. As far as I was concerned, it was even broader than [497] that. In other words, we could not afford to lose, let's say, Sam Snead or Julie Boros out there. We needed every great name we could go get, so if they said they needed a cart to complete 18 holes, they got a cart.

* * * *

Q. And was it a unanimous determination of the board that carts be banned except that cart use would be permitted in Pro-Am rounds and for players with bona fide medical certificates?

A. Yes, that was, you know, a medical—yeah, that's correct .

Q. That was what the division board unanimously agreed on?

A. Right. Because we needed those fellows out there for the draw.

* * * *

[498] Q. To this day, any player who is 50 or older and who needs a cart due to a medical disability is accommodated, am I correct?

A. No. Today on the Senior Tour, to the best of my knowledge, if they want to use a cart, they can use a cart. If they want to walk, they can walk.

Q. And in that way—

A. And the reason for that is the board passed a rule change, what Arnold proposed, and it didn't take but, as I said, two weeks out on tour and there was an uproar against it, and the guys said, hey, wait a minute, we are going to lose the great old names. We can't have this, so let's put this all to bed. Let people use carts if they want to use carts, let them walk if they want to walk. The purpose of it is let's get the names out on the field of play.

* * * *

Q, All right. Now, Mr. Ferris, do you have any way of keeping track with of your seniors use carts and which do not?

A. I have no idea.

* * * *

[501] Q. And they are making their living and their livelihood on the Senior Tour, aren't they?

A. They are making their living and their livelihood, sure. Many of them are. Many of them are.

Q. And the total purses available on the Senior Tour are over 40 million dollars, aren't they?

A. I believe they are.

Q. And that compares to a total of 6.4 million on the Nike Tour, doesn't it?

A. I will accept what you say to be that.

Q. And one stroke can make the difference between first and second on the Senior Tour, can't it?

A. Makes the difference in any game of golf, yes.

* * * *

Q. And if a player is 49 years old plus 364 days and that player plays in a tournament, that player is playing the same golf that he plays when he turns 50 years old the next day, isn't he?

[502] A. You mean if a player is playing on the regular Tour, if he's on the regular Tour and then when he passes—when he becomes age 50—not many of them continue to play on the regular tour. Their golf game goes into a hiatus, they become a club pro for awhile, and then they come back out and say, hey, the Senior Tour is here, golf's greatest mulligan. I'm going out and I'm going to see if I can go do it again. Some players transition directly from the regular tour to the Senior Tour, but I think it's important to distinguish that not all do.

Q. Right. Well, the ones that do, when they are stroking the ball, practicing their game, figuring out their strategy, doing their putting—

A. Um-hmm.

Q. —they are playing in the same manner that they played the day before when they were only 49 and 364 days old?

A. Exactly, correct.

TRIAL TESTIMONY
[520 H. Toscano - D]

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Q. Okay. Now do you go under the same rules, the USGA rules? And are those your rules of competitions?

A. Yes.

Q. And do those—do those rules—those rules govern the competition, and then you have your local conditions of competition promulgated by the PGA; is that correct?

A. Right.

Q. The hard card?

A. Yes, that's correct.

* * * *

[521] Q. Okay. Now, do you feel—Do you walk, sir, when you play?

A. Yes, I prefer to walk.

Q. Okay. Do you feel that you are at a competitive disadvantage to the seniors who ride?

A. No, I don't feel that way at all. In fact, I believe when I walk, you know, my blood flows better, I think better, I'm more aware of what's going on, and I have the ability to think about what I'm doing, and sometimes, if you get a little upset, you can walk it off. And so I consider it an advantage to walk.

Q. Okay Now George Archer, he's a member of the Senior Tour?

A. Right.

Q. He has a bad hip?

A. Yes, he does.

Q. And he uses a cart?

A. I believe George does ride, yes.

Q. All right. Do you feel when you play against George Archer that you are at a disadvantage because you walk?

A. No.

Q. Okay. And the two money—the winners, the two main winners on the Senior Tour, Hale Irwin and Gil Morgan, you indicated that they walk like you?

A Yes.

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TRIAL TESTIMONY
[549 C. Martin- D]

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Q. Can you describe generally your medical condition through your childhood, please?

[550] A. Well, I was born with Klippel-Trenaunay-Weber syndrome, and basically the blood goes down into my leg, but the veins don't bring it up properly.

Q. Okay. And can you indicate how this affects you mentally, this condition? In connection with your play of golf, what stress that causes you?

A. Certainly. There's a lot of pain involved. Oftentimes severe. A lot of discomfort with the stocking I have to wear. That wears on you, both mentally and physically. There's also a stigma attached when you limp and no one else does and you're kind of known as a person with a disability that I have to deal with.

* * * *

[552] Now, has your condition worsened over the last year or so?

A. My condition has been steadily worsening for about the last four years, I'd say. Ever since—well, it's always been bad, but I can remember midway through college I started really suffering, especially in my shin, in a way that I hadn't experienced before. And that's been progressively getting worse the last four years.

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[563] Q. So do you see any advantage that you would have over a PGA Tour player, competitor of yours, in hot weather if you were allowed to ride a cart as opposed to them walking?

A. I don't see an advantage. If I could trade my leg and [564] a cart for that good leg, I'd do it any time, anywhere.

* * * *

[565] Q. Now, can you tell. us with respect to the college later on, they did accommodate you upon your application, is that correct?

A. Yes.

Q. Okay. And you were allowed to use a cart, then, under the PAC-10 rule that allowed for cart accommodation upon a medical verification and application?

A. That is right.

* * * *

[567] Q. Okay. Now, the NCAA granted you a cart under their nondiscriminatory clauses?

A. Yeah. The NCAA and PAC-10 has a clause that says it you're legally disabled, all—you know, you have to apply for it, and if they pass it, majority vote, I don't know the exact details of it, but you can gain accommodation. And I did. I was granted that in college.

Q. Now, after college, because you were no longer required to carry your bag, did you think that you'd be able to play professional golf without difficulty by using a caddie?

A. Yeah. In fact, after I graduated from college I was excited because I figured the tough part was done, you know, 36 holes carrying your bag, and now I could, you know, have a caddie. And it just—excuse me—my leg just has been deteriorating. It took a beating in college and stuff and just hasn't come around. It's not that the conditions or the walking is so strenuous in professional golf. It's just that my leg's gotten bad.

* * * *

[568] Q. In PGA Tour golf and PGA Nike Tour you play under the USGA rules, the same as you did in college?

A. Yes.

Q. And those rules, 1 gather from what's been said so far, those rules don't require that you walk the rounds?

A. No, it's optional.

Q. Okay. And is there, in a book *Decisions,* which is interpretive, I believe the court has the book *Decisions* on Page 515 is there a statement therein that in competition carts are allowable?

A. Yes. I believe the USGA ruled that carts are allowed in competition.

Q. Okay.

A. In the highest level of competition.

Q. And there was some discussion about handicaps that was given by Mr. Ferris, and just to get through that, handicaps are used at the amateur level so that fellows who want to go out and play and some guy's a lot better than the other, the guy that's the better player has to give the other guy some extra strokes?

A. That's right. And I don't believe there's any recognition of who rides and who walks.

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[569] Q. Now, if both of those players played against each other and one used a cart and the other walked, does the one who uses a cart have to make an adjustment because he's using a cart?

A. No. No.

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[570] Q. Okay. Now, in factoring handicaps, do they factor into the equation whether you used a golf cart or not?

A. No, they do not.

[571] Q. All right. Have you ever known that they factored in the golf cart into the equation to say that you had an easier time with a round or a tougher time?

A. It's a nonissue.

Q. Okay.

Now, what advantages do you see—you would prefer to walk, is that what I gather, if you could?

A. Oh, absolutely, I'd prefer to walk. In college I was granted an exemption to ride, but every time my leg felt up to it, I walked at every possible chance.

* * * *

Q. All right. Now, when you use a cart, how much walking do you do, would you say?

A. I still have to walk a lot. There's a lot of times the cart can't get close enough to the ball, whether it be weather conditions, if it's wet, or around the greens. You're still required to walk. I mean, clearly not as much as if you were to walk the full course. But I'd say I walk, you know, 100 yards for a 400-yard hole, at least.

Q. Okay. About 25 percent?

A. I'd say—yeah, I mean, I could never say. But depends on some courses. At Lakeland, for example, when I played there, they wouldn't allow me to take a cart off the path, cause it was wet. So I walked a lot. I can't say I walked as much as everyone else, but it wasn't nearly the [572] differential you'd be made to believe.

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[576] A. You had two options. You either had a caddie or you took a cart. And you couldn't deviate from those two.

Q. Did it change the nature of the competition?

A. Absolutely not. It was the same game. Everyone played. And the PGA Tour made no distinction, they didn't know who rode, who didn't. It was a nonissue.

Q. All right. And then and then—at the second stage of competition, same rules, USGA?

A. USGA rules. You—you know, it was the same deal as first stage.

Q. And did it change the nature of the competition as far as you could perceive?

A. Absolutely not.

Q. Okay. And did it appear that the players with carts were given any advantage over the ones that were walking and using caddies?

A. Clearly not.

Q. Okay. now, in the third stage, the court entered a temporary injunction, and then you went down there to play in the third stage, there were 168 players, is that right, 56 per course?

A. That's correct.

Q. And you would play one course three times and the other course three times?

A. You'd rotate, yes.

[577] Q. Okay. And there was some question whether Mr. Duncan—he's the tournament director for Nike?

A. Um-hm.

Q. There was some question whether he did or didn't keep count of the players that used the cart as opposed to those who walked. But let's say, for example, let's just say right now, let's say you're in the third day of Q school, you are on the course, you're out there, how many—how many players did you see actually use a cart separate and apart from yourself?

A. That's a great question, because when I went back there I was anxious to find out. Had they changed the rule to allow everyone to ride except me, I was anxious to find out how many guys would choose to ride. The first day I did not see one person in the cart besides myself. Throughout the entire six days I think I saw a handful, five or six. That was throughout the entire six rounds. And I was looking hard because I was interested. And I—I'd say just a handful of guys over those six periods.

* * * *

[585] Q. Okay. And did the medical notebook that the court has, were all those records sent back, to the best of your knowledge, to the Tour?

A. Yes.

Q. Was a copy of the tape that's been played in court sent to the Tour?

A. I believe that was sent to them. I think after the Q School, though.

Q. Okay. Were they returned to us?

A. They were returned to us, yes.

Q. Do you know—do you know why—why they were returned to us?

A. I just know they said it was irrelevant and that I'd have—I know they said I had a competitive advantage, and yet they never considered my condition.

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[590] C. Martin - X

Q. Are you familiar with the rule that limits competitors in most tournaments to carrying 14 clubs in their bag?

A Yes.

Q. And you would agree with me, would you not, sir, just to take that as an example, that if that rule were altered for one competitor and not others that that would fundamentally alter the nature of the competition?

A. Well, certainly. Because that's shot-making, that's where the game is played, with your clubs. And so if someone had an advantage with their clubs, I could see [591] where that would be an alteration of the game.

Q. And similarly, sir, if—if you showed up for a competition and you were told that you were going to be required to adhere to the one-ball rule contained in the conditions of the competition on the hard card, but that the other competitors in the competition would not, you would consider that to be a fundamental alteration of the rules, correct?

A. I would. Only because, again, that's shot-making, that's when you hit the ball and that would constitute, I believe, you know, an alteration of the game.

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[603] C. Martin – ReD

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Q. You indicated the distinction on the 14 club rule and the one-ball rule is that that relates to the actual competition, the actual game itself.

A. Actually striking the ball.

Q. Okay. Now, can you tell the court why, if a player had 15 clubs in his bag as opposed to 14, he carried an extra club, what extra club might he carry and how might that be advantageous?

A. He could carry a utility club or some club that could be an advantage over someone else, simply because of the nature of the club. You'd have one extra tool to work with.

Q. Okay. And that one-ball rule, there's been described a high compression ball off the tee—

A. One-ball rule, I mean, I don't if it's a fundamental of golf, but they do it just to kind of prevent you from taking a hard ball off the tee and a soft ball into the green. Kind of towards that.

Q. Can you explain to the court just briefly, what's the advantage of having a hard ball off the tee and a soft ball [604] around the green?

A. Sure. On some holes that are long you'd play a hard ball and get all the distance. Whereas on a short or a Par 3, with the pin tucked behind the sand bunker or something, you'd want a soft ball. They just eliminate that. They make you play one ball so you don't gain an advantage either way.

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[602] C. Martin – X

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Q. And you filed tax returns, as we're all required to do, right?

A. Yes.

Q. And when you filed the tax returns, you described yourself as self-employed, correct?

A. I believe that's right.

Q. And you deducted as a self-employed individual on your tax returns all the expenses that you had incurred in participating in those tournaments, such as your travel and lodging and meals, et cetera, correct?

A. Correct.

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TRIAL TESTIMONY
[637 K. Venturi – D]

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Q. Now, Mr. Venturi, based on your experience as a professional golfer and golf analyst, sir, to what extent do fatigue and stress affect a professional golfer during the course of golf tournament.

A. Well, the physical stress is—comes with—what—they go hand-in-hand. Mentally, you can drain yourself physically like that, too, because of the titles, the pressure. There are times that you, you know, you just don't eat sometimes. It depends how you handle pressure, and those that handle pressure better are those that—there's all these ingredients which go together to make up a champion. But being physically fit is very, very important. That's why there are times that—that I have [638] had times in—when—in my—when I was going full bore, it was nothing for me to take a day off and hit golf balls for seven, eight hours.

Q. But in terms of the competition, itself, sir, four days of 18 holes or perhaps, because of weather conditions, more than 18 holes on a single day, to what extent does fatigue become a factor that affects the golfer during the course of the competition?

A. Fatigue is a big factor. In fact, that is what—that is what really alters your game. You have to make—you get the fatiguing and you know it's coming, instead of hitting a certain iron, you may step down and hit one a little bit less, maybe hit it easier. Don't use the strength. You try for more accuracy. But when you feel that you are losing your physical strength or draining yourself, you have to make conditions for it. You have to now revamp your game and revamp your shots.

* * * *

[639] Q. And, sir, does a particular golf course, the configuration of a particular golf course that is being used for

a tournament, have an impact on the level of fatigue that players experience during the course of the tournament?

A. Oh, very much so. You can go to a golf course in Tucson, which is very flat, or go to Phoenix; then turn around and go to a place like Castle Pines that's up in Denver. The Masters, Pebble Beach, very, very difficult walking. Hills, up the hills, the whole thing, and that is where conditioning really takes a big part of it.

Q. Now, you talked about the fatigue factor that affects professional golfers, Mr. Venturi. To what extent, sir, does this fatigue factor tend to build up over the course of the four days of tournament?

A. Well, when you start you play the practice rounds, and I guess in the course of four days you will walk probably somewhere in the vicinity of the 25 miles, and as I said, again going into the mental part of it, once you get to the [640] end you get more fatigued when you are in the hunt. You know, if you are shooting 80, you don't get fatigued. It's when you are getting there. You are getting to the last nine holes. You know what the tournament's—the victory will mean. Mentally, you are getting mentally drained, physically drained and you have to be prepared. By Sunday, you are—you know that the game is on and that you better be ready for it, and if you are not, you are not going to win.

Q. So are you telling the court that this fatigue factor tends to accumulate over the course of the four days of the tournament?

A. Oh, definitely. There's no doubt.

Q. Now, Mr. Venturi, let's talk about your own experience as a professional golfer. I take it from what you said a few moments ago that fatigue was a factor that would affect your own game from time to time?

A. It would—I would always take into consideration, yes.

Q. Well, let's talk about some specifics, sir. Does fatigue during the course of tournament affect your concentration out on the golf course?

A. Oh, yes. Yes.

Q. Tell the court what you mean by that.

A. When you get—when you get physically tired and you [641] are getting mentally tired trying to play, I would get—trying to stay in shape, I would—a lot of times I would get where I would get into like a self—hypnosis. I get myself knowing what I wanted to do when I was walking and playing and never really feel the draining of strength until I got finished, sat in the locker room after finishing. I would just sit down and not realize that—how drained I was.

[643] Q. Does this fatigue factor that you've talked about, Mr. Venturi, affect the manner in which you—you perform as a professional out on the golf course?

A. Oh, there's no doubt, again, but that, that fatigue does play a big part. It will influence your game. It will influence your shot—making. It will influence your decisions.

* * * *

Q. And does fatigue, sir, affect the stroke, itself? The manner in which you hit the ball?

A. Absolutely it does. It's just if you—for—once you start playing, once you start practicing, it would be like how strong you would be for the first hour of practice and how strong you would be for the fourth hour of practice. Your shot—making changes because fatigue is an influence.

* * * *

[645] Q. Now, Mr. Venturi, in your answer you said that the [646] requirement of walking was part of the competition. Would you explain to the court what you mean by that, sir, at the PGA Tour and the Nike Tour level of competition that you are familiar with.

A. Walking is part of the game. It's whether—any sport that you are in, is that walking and conditioning is still what leads to your shot-making. The whole sport combined. You are going to the top level. For fun, for recreation, I don't care what you use. But we are now going to find out the best golfer in the world.

* * * *

[653] Q. Based on your experience, do you believe that it would fundamentally alter the nature of the competition on the PGA Tour and the Nike Tour if competitors in those events were permitted to use golf carts?

A. Yes, absolutely.

Q. Why do you say so, sir?

A. It would—it would take away the fatigue factor in many ways. It would—it would change the game.

* * * *

[665] K. Venturi - x

Q. So it doesn't make any difference if it's 18 holes or 36, the stamina expended or necessary would be the same?

A. It's all the same for everybody.

Q. So the 36 holes has nothing to do with it?

A. I kind of like 36 holes.

* * * *

[676] Q. Now, when you say that the use of carts takes away the fatigue factor, it would be an aid, et cetera, again, as I understand it, you are not testifying now about the plaintiff. You are just talking in general terms?

A. Carts.

Q. Pardon?

A. Carts.

Q. Yeah. You are just talking in general terms?

A. Yes, sir.

* * * *

TRIAL TESTIMONY
[722 J. Bell – D]

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Tell the court, if you would, Ms. Bell, who it is that plays under these Rules of Golf that are promulgated by the United States Golf Association?

A. Well, these are the rules of the game, so all golfers. These are for all people who play the game.

Q. So the two amateurs that go out on the weekend to play golf together would—would play by the Rules of Golf?

A. We certainly hope so.

Q. Or a tournament that is conducted at a private country club for its members, is it your understanding that that would typically be conducted under the Rules of Golf?

A. Well, that's—that's right. If you want to play golf, you need to play by these rules.

Q. Now, you mentioned the Rules of Golf as including certain provisions that are in the appendices. Would you explain to the court what you mean by that.

A. Well, it's just the way the rules are organized. When you get to the appendices, for instance, if we look at Appendix I, the language for local rules that may be adopted by the committee in charge of the competition, this is the people that are conducting the competition.

Q. Now, let's explain that a little bit more. When you say the committee in charge of conducting the competition, [723] who precisely is it that you are talking about?

A. Well, it could be, for instance, at the—at the competition you mentioned it could be the local pro, it could be a championship committee at a club. It could be—In the instance of the United States Open Championship, it would be the United States Golf Association's championship committee. And they would define the conditions of the competition. And those conditions—There's conditions in the appendix as—in terms of there's optional conditions, and there is also language for local rules that relate to specific

situations on certain courses. And it's up to this committee, under Rule 33, to define the conditions of the competition.

Q. Now, let's explore that, Ms. Bell. When a committee that is conducting a competition—and let's take the PGA Tour, for example. If the committee or the organization conducting PGA Tour events decides to adopt certain of the—the optional conditions contained in the appendix to the USGA Rules of Golf, are those still rules of golf for those competitions?

A. Once they are adopted, they certainly are. They are rules of the game being played in that competition.

* * * *

[724] Q. Now, you've referred to Rule 33. Would you—Would you specifically identify for the court what it is that you are referring to in Rule 33 when you talk about Rule 33 having some reference to the appendix.

A. Well, Rule 33 is about the committee. And the committee is in charge of the competition. As I tried to define it, whether it's the United States Golf Association, or whether it's a committee from a club or a committee from—who is running the competition. And it's all about—to have, really, top-level competition. Somebody's got to lay down these conditions under which a [725] competition is played And that's very clear.

* * * *

Q. And Rule 33 charges the committee with determining which conditions it wants to be applicable to its particular events, correct?

A. Correct. And suggests language and the manner in which the committee can lay down these conditions.

* * * *

[726] Q. And does the reference to conditions in Rule 6 and Rule 33 include the optional conditions that are contained in the appendix of the USGA Rules of Golf?

A. Surely.

* * * *

[727] Q. Let's talk for a moment, if we could, about the—the two US Open championships, two of the 13 championship events that you mentioned.

Ms. Bell, is—does the USGA require the competitors in those championship events to walk the golf course during the competition?

A. We do.

Q. Has that always been the case, to your knowledge?

A. It has been. It has been. We think this is an athletic competition, and that that's a key element.

Q. Tell the court, if you would, Ms. Bell, why it is that the United States Golf Association requires the competitors in its United States Open Championship events to walk the golf course.

A. We think it's an athletic competition, and walking is a [728] key element, and we think that—that that's the way to propel yourself around the golf course. And certainly—It's the backdrop of all the other things that go on. It relates to your ability to concentrate, and it's under this condition of walking around the golf course that—that you have to think clearly, and it's more about stamina than it is, in my mind, about fatigue. It's about a longer extension of being able to walk and get around the course.

* * * *

Q. Am I correct, Ms. Bell, that the one-ball rule and the walking requirement are optional conditions that are taken from the appendix of the USGA Rules of Golf?

A. Yes, they are listed as optional conditions under Appendix I.

Q. And the USGA in its championship events adopts its optional conditions for its events?

A. We do.

Q. Now, is it correct, Ms. Bell, that walking is required in all 13 of the USGA's championship events, or are there some in which walking is not required?

A. The two championships where walking is permissible, to use automotive transportation, is in the Senior Women's Amateur Championship and the senior Amateur Championship.

* * * *

[732] Q. Now, Ms. Bell, there's—there's been some suggestion in this—in this litigation that the—the concern about using carts in championship competition has something to do with television and how carts would look on television.

In all your years with the USGA, have you ever heard such a suggestion at the USGA?

A. No, I haven't. I would hope that would never be the case. I mean, I think it's more about this sport, this game, that it is an athletic competition. Obviously it's [733] not a major endurance contest, because otherwise we'd require players to run between shots, but it certainly is part—it's a central part of the competition at the highest level, and no, I—I mean, we are very concerned with the course, making the setup, the—the conditions the best they can be to test the skills of these players against what we—you know, what we define as being top level. And I can't imagine that how something looks on television is—it's too contrived for me.

* * * *

Q. Right. I like the way it sounds when I say that I have a two handicap, so—now, if I have a two handicap and I want to get into a U.S. Open, I can be riding a cart for five straight years, can't I? I can ride a cart as much as I want to for five years and qualify to come into your Open qualifying with a two handicap and you don't hold that against me that I rode in the cart, do you?

A. No. Once you—Once you enter and began the process.

Q. You don't ask the players when they are entering in your qualifying whether they got the two handicap by riding or walking?

A. No. No, we do not.

Q. As a matter of fact, your handicap system doesn't penalize—your handicap system does not impose any penalty against a person who uses a cart, does it?

A. No, it doesn't.

Q. So if—Again, going back to myself and Mr. Martin, if he were to walk and if I—

A. But our handicap system, excuse me, doesn't have anything to do with the conditions of a competition.

* * * *

[749] Q. All right. And the—the USGA rules allow carts to be used in competition, don't they?

A. I don't understand that question.

Q. Your rules allow carts to be used in competition?

A. It depends what the committee in charge of the competition adopts and what they lay down as a condition.

* * * *

[753] Q. Okay. Now, in—on Page 108 of that book it refers to transportation. And it states that, "If it is desired to require players to walk in competition, the following condition is suggested." This is what is suggested: "Players shall walk at all times curing a stipulated round."

Is that correct?

A. That's correct.

Q. Now, if the PGA Tour adopted that language and then added this, "Except as allowed by the tournament director or tournament rules committee, "or—at the Nike level—or if they added this, "Except as permitted by the rules committee for PGA Tour events," that would be added language to your suggested 108, would it not?

A. Well it would be, but there's where you are beginning to change things, because you are talking about exceptions.

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TRIAL TESTIMONY
[763 T. Finchem-D]

* * * *

Q. Mr Finchem, what do you do for a living, sir?

A. I'm the commissioner of the PGA Tour.

Q. How long have you been the commissioner of the PGA Tour?

A. Since June 1st, 1994,

Q. How long have you been associated with the PGA Tour, sir?

A. I've been an employee of the PGA Tour for nearly ten years, and prior to that for three—I guess four years I was an outside consultant to the PGA Tour.

Q. What positions have you held with the Tour prior to becoming commissioner of the PGA Tour?

A. I was, for a very brief period of time upon arriving at the Tour, vice-president of business affairs, and then I was for five years deputy commissioner, and chief operating officer immediately prior to becoming commissioner.

Q. Tell the court, if you would, Mr. Finchem, what your duties and responsibilities are as commissioner of the PGA Tour.

A. My job is to oversee the business affairs of the PGA Tour, serving as, in effect, as chief executive officer, as well as the sports side of the PGA Tour, serving in the traditional role of the commissioner with regard to rules and disciplinary matters of the competitions.

[764] Q. Now, Mr Finchem, explain to the court, if you would, briefly, what the organizational format of the PGA Tour is with a particular emphasis on the three tours that the PGA Tour operates.

A. Well, we have—we are organized in three specific tours, the PGA Tour, the Senior Tour and the Nike Tour. On each of those tours, which combine for a total of, I guess 122 tournaments, we organize those competitions as part of a joint

contract with a cosponsor. The cosponsor stages the tournament. We arrange for the competition of the tournament.

On the Nike Tour we typically have 30 events during the course of the year. On the PGA Tour we typically have 42 events. We include on the PGA Tour as official money, for purposes of our money list, the winnings of any of our members in the PGA Championship, the Masters, the US Open and the British Open.

And among those tours we have approximately 200 players on the PGA Tour who are basically exempt players, 83 players on the Nike Tour who are totally exempt players and a total of about 160, 170 who have some form of access, exempt or otherwise. And then on the Senior Tour we have approximately 110 to 140 players who have different ranges of access, typically 85 are generally what we call exempt players.

* * * *

[765] Q. Now, Mr. Finchem, you—you referenced the requirement that competitors walk. Has it always been the case, to your knowledge, sir, that competitors in PGA Tour [766] and Nike Tour events have been required to walk?

A. Well, certainly for PGA Tour and Nike Tour events The Nike Tour was started in 1990, so I can speak directly to that The PGA Tour was formed as an entity in 1968 and it has always been a requirement that you walk in PGA Tour events since the formation of the PGA Tour. And prior to that, the early beginnings of what we now know as the PGA Tour go all the way back to, I believe, 1916. During those early years it was a division of the PGA of America, and during those years, as well, walking was a requirement.

Q. Now, Mr Finchem, I take it that there are certain rules that are applicable to PGA Tour and Nike Tour competitions?

A. Yes, there are.

Q. What are the sources of the rules that a competitor

needs to access in order to determine what rules govern his participation in PGA Tour and Nike Tour competitions?

A. At all PGA Tour and Nike Tour events the rules that govern the competition and as enforced by our rules officials and tournament director come from three sources. One is the Rules of Golf Judy Bell described. Two is the Conditions of the Competition, which we generally refer to as the hard card. And then on a weekly basis at specific tournaments we have what we call the Notice to Competitors, [767] which relate to any specific things that relate only to changes in conditions for that particular tournament that particular week.

* * * *

Q. Now, you said, Mr Finchem, one of the sources of rules that a competitor in PGA Tour and Nike Tour events must be aware of is the Rules of Golf. You have in front of you Exhibit 59 in evidence. Is that what you are referring to as the Rules of Golf?

A. Yes, it is.

* * * *

Q. Mr. Finchem, first of all, with respect to Defendant's Exhibit 105, can you identify that for the court as a copy of the hard card for the PGA Tour that you previously described for the court?

A. Yes, it is.

Q. Tell the court, if you would, what the hard card is and how it is utilized by PGA Tour in terms of setting forth rules for its competitions.

[768] A. It's a statement that's promulgated by the tour office, typically on an annual basis, that relates to whatever conditions and local rules we are going to operate under during the course of the year pursuant to the Rules of Golf.

* * * *

[769] Q. And what's the reason that Notices to Competitors are given to the competitors at the outset of the tournament, Mr. Finchem.

A. Because this is—this is part of the rules of golf that will control the competition for that week, and it's important that the competitors in the competition that week understand the rules that they will be playing under during that week of competition.

Q. Why is it necessary, Mr Finchem, to wait until the start of a particular competition to give the competitors the Notice to Competitors as a supplement to the Rules of Golf and the hard card that contains the separate conditions of the competition?

A. Well, the Notice to Competitors deals with some of the vagaries that occur as they relate to the particular golf course involved that particular week. Our golf courses change from time to time. Tournaments, we have an advance staff that goes in the week before, and among other things, [770] in reviewing the property, we'll develop the Notice to Competitors. It may relate to damage on the golf course, water hazards might change, there's a variety of things that might impact in the final—final version of what the Notice to Competitors says.

Q. Now, you said, Mr. Finchem, that all three sources that you have in front of you, the Rules of Golf, the hard card and the separate Notice to Competitors, at the start of a particular tournament are the rules applicable to the competition; is that correct?

A. That's correct.

Q. Does a competitor have the right to pick and choose any of those rules that he wishes to follow or not follow?

A. No. All the rules apply to all the competitors in the field.

Q. And do the rules contained on those resources, the Rules of Golf, the hard card and the separate Notice to Competitors, apply equally to all of the participants in the competition?

A. Absolutely.

* * * *

[771] Q. Tell the court, if you would, Mr Finchem, why the PGA Tour requires participants in Nike Tour and PGA Tour competitions to walk?

A We believe that the walking and the physical challenge that it entails in walking 72 holes of golf over four days in a variety of conditions is a key element to the competitive nature of the game, combined with the stress level that is involved in the competition, combined with the challenge of—the other challenges faced by the competitor with regard to the setup of the golf course. All of these factors work together to create a unique challenge for just the players at this level, the elite players at championship professional tournament level of golf.

Q. Now, Mr. Finchem, there's been a suggestion in this case that the walking requirement applicable to PGA Tour and Nike Tour events is—is not really an integral or essential, whatever term you want to use, part of the competition, but is merely a matter of tradition. How do you respond to that kind of an accusation, sir?

[772] A. Well, it's just not correct If we were only taking this position in this case, because this is the way we've always done it since the Scots played in 1500, we would be wasting our time. The reality is that walking is a fundamental part of the competition. It is one of the things that separate the level of competition at the PGA Tour level from all other levels of competition in the game of golf. And even though we've done it for a long, long time in the game of golf, that is not the reason that we feel that walking is so important to the integrity of the competition at this level.

Q. Mr. Finchem, there's also been a suggestion in this case that the—the prohibition on the use of golf carts by competitors in PGA Tour and Nike Tour competitions is somehow related to how golf carts might appear on TV. How do you respond to that, sir?

A. Well, that's not correct. And let me make two comments that I think will support that. One, walking has

been viewed as an important part of the game for a long time before television came to the game. As a matter of fact, at the time of the advent of the PGA Tour in 1968, I think we had about 100 hours of golf on television. Now we have 750 hours of golf. But even before any television or telecasts of golf, walking was a part of the game.

Secondly, we have carts on the Senior Tour. We [773] have an enormous amount of senior golf on television. It does not disrupt our telecast. It does not impinge in any way on the financial viability of the Senior Tour, and it's just not correct to suggest that we would want to maintain this rule because it looks good on television.

* * * *

Q. Now, Mr Finchem, if even one competitor in a PGA Tour or Nike Tour event was given a waiver from the walking requirement and permitted to use a cart in competition, do you believe, sir, that it would fundamentally alter the nature of PGA Tour and Nike Tour competitions?

A. I do.

Q. Why, sir?

A. For two reasons. One, it works toward taking the aspect of walking out of the game. If all the competitors [774] don't have to do it, it removes it as a key ingredient to test the competitive capabilities of players.

Secondly, I believe that one of the key and fundamental things about athletic competition is that the challenge be the same for everyone. That the rules be the same for everyone, whether it's the gridiron, in the tennis court, or the baseball diamond, or the World Cup ski slope, that the rules be the same for everyone.

And once you start to change that you fundamentally, fundamentally change the way athletes are measured. Athletics is all about bringing your physical attributes to the same playing field versus your competitor and using the same rules to test who is better on a given day. And just one

competitor being allowed to have—play by a different set of rules undermines that.

* * * *

[775] Q. Mr Finchem, would you agree, sir, that professional golfers who participate in PGA Tour and Nike Tour events all bring different physical attributes to the start of the competition?

A. Absolutely I mean, for example, if driving distance was the most important part about playing the game, I guess John Daly would win every week. He doesn't. That's one of the great things about the game of golf. There is a certain set of challenges that present themselves to the competitors, and each of them brings their own physical attributes and deals with those in different ways, including the mental stress of the game, which, again, is linked inextricably, in our judgment, with the physical challenge of walking the golf course.

Q. Mr. Finchem, do you know of any way, sir, to attempt to equalize the different physical attributes of [776] participants at the start of the competition such as PGA Tour and Nike Tour events?

A. No, I don't know of any way to do that. You know, with regard to this particular case, I wish there were. But I don't. I don't know how you can make rules that can artificially equalize the playing field when you start providing different support for different players. If I did have a way, I would have advanced it. I just don't, and I don't know of anyone that does.

* * * *

[777] Q. Now, Mr. Finchem, does the PGA Tour keep track of scoring averages of members of the PGA Tour and the Nike Tour?

A. We do.

* * * *

[779] Q. Now, Mr. Finchem, can you tell from these documents that comprise Defendant's Exhibit 122 whether or not a stroke difference, on average, over the course of a year is significant as far as PGA Tour and Nike Tour players are concerned?

A. A stroke difference over the course of a year is [780] enormously—has an enormous impact on statistics and the money list.

* * * *

Q. Just so I understand, sir, one stroke difference on average between them meant the difference between being [781] ranked second on the Tour and ranked 25th on the Tour?

A. That's correct.

* * * *

[782] Q. Now, these numbers that we've been talking about, derived from Defendant's Exhibit 122, Mr. Finchem, is this part of the reason why the. PGA Tour is concerned about the integrity of the competition and making sure that all players participate under the same rules?

A. Absolutely. Because when we talk about ~ when we talk about changing a rule to provide for one player or [783] some subset of players, you have to take into consideration what it does to the overall fairness and equity of the competition with regard to all the other players.

* * * *

Q. Tell the court, if you would, Mr. Finchem, and let's disregard for a moment scoring averages over the course of the year, can you tell the court whether or not just one stroke during the course of the year, however many tournaments that may be, 30, 40, one stroke during the course of all those tournaments, can it have a significant difference in a player's placement in the PGA Tour or Nike Tour?

A. It can have an enormous difference.

Q. Would you explain that to the Court.

A. I will give you an example. There are lots of [784] examples, but last year Billy Andrade finished 31st on the money list. The difference between 31st and 30th is access to the Tour Championship, which was a two million dollar event at the end of the year, access to the United States Open, access to the Masters the following year. Billy Andrade was five dollars short of making the top 30. There's probably 40 different rounds of golf he played, maybe more, where one shot, all year long, would have made the difference between him finishing 31st and 30th.

* * * *

Q. Now, Mr. Finchem, is it possible, sir, for the PGA tour to quantify the competitive advantage that a competitor gets if a particular rule of a competition is waived as to that competitor?

A. I don't know how you would do that, no.

Q. Let me give you an example, sir. You know, do you not, that one of the rules applicable to PGA Tour and Nike Tour competitions is that the competitors are permitted to carry with them only 14 golf clubs in their bag?

A. That's correct.

Q. Can you, sir, in any way quantify or adjust for the [785] competitive advantage that a competitor might obtain if a competitor were permitted to carry more than 14 clubs in his bag?

A No, because the—the clubs used differ, based on where—what the player does during the course of a round. He may go out and play with seven clubs. He might use every club in the bag and wish he had a 15th. It depends on how his round goes and where he hits it and, you know, what his shot values are. How you would compensate for that in the rules or draw a distinction that says, okay, we could make it even, is just an impossibility.

* * * *

[788] Q. Well, are there certain golf courses or certain weather conditions or other factors that sometimes make the walking requirement more of a factor or more of an element in the competition than it might be in other situations?

A. Sure. You can—we play on golf courses all over the country, now all over the world. Some of them are hilly. Some of them are flat. We play in cold weather. We play in hot weather. The degree to which riding in a golf cart could be construed as an advantage, in fact it would be an advantage, varies based on the topographical conditions of the golf course, based on the weather, based on a variety of different factors.

* * * *

Q. * * * * There is language on the hard card, is there not, sir, relating to walking during the course of PGA Tour competitions?

A. Yes.

* * * *

[789] Q. Would you read that for the court, sir? What does it

A. It says: "The players shall walk stipulated round, unless permitted to rules committee."

Q. Now, let's concentrate on the —sir, "Unless permitted to ride by the committee."

Is there a—an understanding or procedure within the PGA Tour as to when that exception is to be applied?

A. Yes.

Q. What is it, sir?

A. Well, let me give you a moment of background. In the last 30 years, more and more golf courses have been constructed in this country that are built for some sort of real estate-related purpose. Unlike walking at where we play the Players Championship in Florida, which is what we call a

core golf course, they just have golf, or at the Augusta National or at Marion or many golf courses that are chosen by the United States Golf Association for their championship, we have many golf courses today that are strung out through hotels, business environments and largely residential areas. When those golf courses are constructed, there's a premium on creating the most [790] possible frontage to the golf course from a real estate value standpoint. Consequently, most of the golf courses constructed in the last 30 years have two loops, two nine-hole loops that often are separated by some distance, and then between the greens and the following tee there oftentimes are significant amounts of distance, as well.

To deal with that, we have authorized our tournament staff from time to time to provide shuttles for players to go between—most often this is the case between the 9th green and the 10th green on the golf course. Excuse me, the 10th tee. Sometimes between a green and a tee.

The reason we do that primarily is because of pace of play. On Thursdays and Fridays we play to give—to create the most possible playing opportunities for our competitors, we play the maximum number of players that we think we can get on the golf course. It varies in the winter of 132, all the way up to 156. The golf course is full.

When we create a pace of play problem because of a long, extended walk down a cart path, across a bridge, between the green and the tee, we are creating an unfairness, because if the pace of play slows down on this nine holes as opposed to the other nine holes, we are having players wait, and it's not the appropriate type of [791] competition we want. It creates unfair conditions.

We compensate for that from time to time by giving our PGA tournament tour—or rules officials the authority to provide shuttling in certain instances. I think right now on the PGA Tour and Nike Tour it happens a couple of dozen places. It's typically between the 9th green and the 10th tee. Occasionally between holes, as well.

There's also a safety factor in certain places. Some of these golf courses are built on significantly different terrain, and where there is—where there is wet pavement conditions, players typically still largely wear metal spikes, oftentimes for safety reasons the tour staff will recommend we go to a shuttle system.

Q. Is shuttling used in all tournaments, sir?

A. No.

Q. Does the tournament director, Mr. Finchem, have the authority to—to allow shuttling in any instance that he deems it appropriate?

A. No.

Q. What instruction, if any, Mr. Finchem, is given to the tournament director about what he can or cannot do in the way of shuttling, using the language that you've just read from the hard card?

A. The direction to the rules officials is that where [792] there are conditions that put great strain on the pace of play and/or safety constraints, that they are authorized to look at shuttling as a way to alleviate that. It's reviewed on an annual basis by our executive vice-president of competition. We do not use it unless we think it is necessary to the integrity of the competition.

Q. And, Mr. Finchem, is the tournament director authorized to use that provision that you just read from the hard card to allow a competitor to use a golf cart throughout tournament play?

A. No.

* * * *

[794] Q. In the qualifying tournament in past years, sir—

A. Yes

Q. —have competitors been permitted to use golf carts?

A They have.

Q. And what is the reason, Mr. Finchem, that competitors in the national qualifying tournament have been permitted to use golf carts in past years?

A. Well, I think there's a couple reasons. One is that the—we get an awful lot, in the thousands, of people who aspire to play the PGA Tour, who enter the qualifying tournament at the local level. Administratively it has been determined over the years that it's impossible to require them, all of those players, to —to get caddies, for the combined reasons of the availablility of that number of caddies at the first and second stage of qualifying, and I suppose, the cost of caddies, as well, plays some [795] role in that, as well.

In addition to that, the—in the early stages of qualifying, the competition is to go to a higher stage. And frankly, we get a lot of people who enter the qualifying tournament who have a quality of game that is not going to take them on to the next stage, and we view it as a winnowing-out process, if you will, but those are the basic reasons.

Q. Now, in this past year, 1997, Mr. Finchem, did the PGA Tour make a decision to alter the requirement or at least change the procedure with respect to use of golf carts at least in the finals of the qualifying tournament?

A. Yes, we did.

Q. Tell the court, if you would, sir, why the PGA Tour did that?

A. Actually I think the decision was made in 1996 for the 1997 qualifying tournament, if I'm not mistaken.

But the reason for that was to —we felt it was very important to try to make the finals of the qualifying tournament as much like the challenge that a player faces at the PGA Tour level as possible.

Over the years we have allowed carts, and the vast majority of players have used carts in the finals of the qualifying tournament. In 19—late 1994, early 1995, [796] after I became commissioner, one of the things that I learned from talking to a great deal of players was a concern about that aspect of the finals in the qualifying tournament. The objective of the Tour is to create the best possible competition

as a qualifier to come—before you come to play the PGA Tour, but a lot of players voiced to me in 1995 that they felt that not requiring caddies, having carts, did not create the same challenge level in the finals of the qualifying tournament as we have on the PGA Tour.

In the finals of the qualifying tournament, in addition to players who come up from first and second stage qualifying, any player who finishes 126th to 150 on the money list is exempted to the finals. So the players we have in the finals in most years are a mix of new players, of players who have had a history of playing on the PGA Tour. A lot of those players were very concerned about that. I began a process of talking to our board about changing that in late 1995. That culminated in 1996. We put it into effect it the 1997 qualifying tournament.

Q. Why didn't you do it earlier, Mr. Finchem?

A. Well, I wasn't commissioner. When I became commissioner, I used the transition to reach out to the players, learn an awful lot about different things that we could do better.

* * * *

[798] Q. Did there come a time, Mr. Finchem, in late 1997, a few months ago, when you were informed that Mr. Martin had made a request to use a golf cart during the finals of the qualifying tournament?.

A. Yes.

Q. How did that come to your attention?

A. Mr. Moorhouse brought it to my attention.

Q. And do you know how it came to his attention?

A. Yes. He copied me on a—a letter from—I believe from his lawyer. There might have been a doctor's letter with it. I believe there was a doctor's letter with it, [799] indicating that Casey had a disability that would preclude him from walking in the requisite number of rounds in the qualifying school third stage, and made a request for him to have special exemption to utilize a golf cart.

Q. What did you do in response to that request that you received from Mr. Martin or his lawyer?

A. I reviewed it with Ed Moorhouse, and Ed asked us what position we should take on it, and we determined that it would not be consistent with the rules that had been agreed upon for the third stage of qualifying. We denied the request.

* * * *

[804] Q. Explain, if you would, sir, how the Senior PGA Tour differs from the PGA Tour, itself, and the Nike Tour that we've been talking about for the last hour or so.

A. Well, it differs in a whole range of ways. The thing that separates PGA Tour and Nike Tour golf from virtually every other kind of competition at the professional level is that the reason you are there is because you performed at a certain level of competence. You compete in certain tournaments and your access to our tournaments is based on your quality of competition. There aren't any ifs, ands, or buts. That's the way it is.

The Senior Tour is different. The Senior Tour is [805] a combination of access from players who are playing pretty well now; that is, the current money list; and players who have played well over the course of 30 or 40 years. That's number one. That's a very fundamental difference.

Secondly, we don't have a cut on the Senior Tour. The reason is if we had a cut, some of the players who play off that all-time money list, who aren't as good now as they used to be and certainly aren't as good now as the better players are now, would be cut. And the sponsors certainly don't want to have any part of marketing the tournament without some of those great names playing.

Thirdly is we allow carts on the Senior Tour, and the reason we do so is because some of those players, once they get to a certain age, start to lose the ability to walk what amounts to, depending on where you are on the money list, five rounds of golf, two Pro-Ams and three competition

rounds without a cart. So 15 years ago the decision was made to provide carts to extend the careers of those great players. It is wholly different from the PGA Tour, where the—the—the effort of our organization is to provide the greatest possible challenge to the best players currently in the world on a whole range of levels. And consequently we also have a difference in the setup of the golf course. The golf courses are not quite as long.

[811] Q. Now, Mr. Finchem, does the PGA Tour, sir, tell PGA Tour and Nike Tour Player in which tournaments they must compete?

A. No.

Q. Does the PGA Tour have any ability to do that, sir?

A. No I wish we did, but we don't.

* * * *

Q. Do many players often opt not to participate in tournaments?

A. Yes, quite frequently, depending on the player.

* * * *

[812] Q. Does the PGA Tour, sir, have any control over the manner in which a member of the PGA Tour, the Nike Tour plays, other than to specify the rules governing the competition?

A. Absolutely not.

Q. Does the PGA Tour have any control over the type of clubs or the type of balls that are used in competition by [813] members of the PGA Tour or the Nike Tour?

A. Not the type, no.

* * * *

Q. Does the PGA Tour or the Nike Tour have—have any control over the type of shots or the manner in which a—a member of either of those tours actually plays the game during a tournament?

A. No.

* * * *

[815] Q. The PGA Tour does not reimburse players for the expenses they incur, in other words, for caddies or transportation or meals or lodging; is that correct?

A. Absolutely not.

* * * *

Q. And is it true, sir, that the—a PGA Tour and Nike Tour member must pay the expenses of acquiring his own clubs, balls or other implements that he uses in the course of competition?

A. He is responsible for that, yes.

* * * *

[832] T. Finchem-x

Q. And you have not been able to find a single document where the defendant has put in writing, prior to 1998, that walking is a fundamental part of its tournaments, have you?

A. A document that uses those words?

Q. Well, anything that the defendant has produced which either states or in some way—whether it states directly or indirectly, that walking is a fundamental part of the tournaments it produces?

A I don' t know of a document that says that, no.

Q. Now, you know that the game of golf, the essentials, the definition of the game of golf, is stated in the rules at Rule 1-1, don't you?

[835] A. Yes.

Q. And that definition of the game of golf, in its essentials, has been adopted by the PGA Tour, Inc. for its tournaments, hasn't it?

A. We accept the USGA Rules of Golf, and we reserve the right to amend them as we might see fit, which we have done from time to time.

Q. Right. But you haven't amended this definition of the game, have you?

A. No, we have not.

Q. And that definition talks about the game consisting of playing a ball from the teeing ground into the hole by a stroke or successive strokes, doesn't it?

A. Yes, it does.

Q. Now I'd like to talk about the scoring averages that you raised. I don't have any fancy charts, but am I correct that the people on the Senior Tour make their living playing professional golf, as well as those on the other two tours?

A. Many of them do, yes.

Q. And am I correct that one stroke can make a difference between first and second place on the Senior Tour, as well as on the other tours?

A. Yes, it can.

* * * *

[836] Q. All right. Now, you permit the amateurs in those competitions to use carts, though, don't you?

A. Occasionally, yes.

Q. Now, let's talk about the open and sectional qualifying rounds, those are held every week before each

tournament to determine who, besides your regular PGA players, will play in those events, aren't they?

A. Correct.

Q. And the open qualifiers held on Mondays are sometimes referred to as the Monday qualifiers?

A. Yes, Monday qualifiers.

Q. And from four to 14 players qualify to participate in official tournaments as a result of their performance in these open and sectional qualifying tournaments?

A. Typically four, that's correct.

Q. Depending on the tournament, whether it's a Nike Tour—

A. Few exceptions, basically four, but sometimes more.

Q. All right. And the purpose of these tournaments is to separate the wheat from the chaff?

A. Which tournaments?

[837] Q. The qualifying tournaments.

A. The purpose of the tournaments is to give an opportunity for players who are not otherwise exempt under the tournament to compete for a spot, usually four spots in the tournament out of 144 or 156.

Q. Right. But you are trying to decide which of all the competitors that want those spots are going to be deemed good enough to have a spot, right?

A. That's correct.

Q. And you don't want to have a golfer who's not as good get their way into the tournament, you want the best golfers to get into the tournament?

A. Well, when you talk about a one-day qualifier, what you are allowing into the tournament is four players who shoot the best score that particular day and that 18 holes, that's correct.

Q. Right. So you're trying to find the ones that have the highest level of skill?

A. If possible, that's correct.

Q. All right. And there are times when entrants from your Monday qualifiers go on and actually win the tournament, aren't there?

A. There have been times, yes.

Q. For instance, Mr. P. J. Cowan won the Nike Tallahassee Open in 1996, didn't he?

* * * *

[839] Q. And you require that to the extent possible the conditions in the open qualifying shall be comparable to those of the tournament site in conditioning, speed of greens, et cetera, don't you?

A. If possible, that's correct.

Q. And that is so that you can test golfing skill, isn't it?

A. As best as we can, yes.

Q. But you don't require in that document that the golfers in the open and sectional qualifying tournaments walk, do you?

A. No, we don't.

Q. You could include that requirement if walking were an important part of your competition, couldn't you?

A. Well, we could. But it's covered under the rules of competition.

Q. Well, professional golfers do not have to walk in Monday and sectional qualifying tournaments, do they?

A. We allow them to ride carts in Monday qualifying, yes.

* * * *

[841] A. No, I didn't say that. I said if the tournament committee determined that there was going to be—there was no requirement to walk in an open qualifying, just like the second stage—first or second stage of the qualifying school, it would most likely be in the Notice to Competitors, if you're searching for where it will appear. I will tell you that we do not require walking most weeks in opening qualifying, just like we don't require the first and second stage of the qualifying tournament. If that's what you're searching for, that's true.

* * * *

[843] Q. Now, there's a provision there about caddies and golf carts, is that right?

A. Yes, ma'am.

Q. All right. And am I correct that there's a similar provision in the earlier book for the regular PGA Tour?

A. I believe they're identical.

Q. And so in the PGA regular tour and the Nike Tour, it says that golfers must use caddies and not carts for all qualifying rounds, is that correct?

[844] A. That's what it says.

Q. But you said previously that golfers can use carts in qualifying rounds?

A. If the committee—our competitions are governed first and foremost by the rules of golf. As a committee, the competition has discretion to make certain determinations. It can make those determinations notwithstanding the regulations.

Q. So it's the tournament director who decides that carts can be used, even though this regulation is written here requiring—

A. He can in certain circumstances make that determination, yes.

Q. All right.

And is that determination of the tournament director in writing anywhere?

A. Is the determination in writing? It would be in the Notice to Competitors, or typically in the Notice to Competitors.

Q. All right.

Now I'd like to talk about Q school. Q school is used to determine who will be exempt on both the regular PGA Tour and. the Nike Tour, is that right?

A. Yes, ma'am.

* * * *

[845] Yes, it is.

Q. All right. And you take in about 1200 applications, and then you winnow those down and the top 168, as long as

they finish the Q school, will be members of either the regular or the Nike Tours, is that right?

A. What was the number you used?

Q. Down to 168.

A. Yes, they would be members on some level of access, that's correct.

Q. All right. The highest 37 plus ties become members of the regular Tour, and then all the remainder become members of the Nike Tour, just with differing rights, depending upon where they fall?

A. Differing levels of access; that's correct.

Q. All right.

So once the player makes it to the final stage, where you're down to those 168, he knows that he's on one tour or the other?

A. That's correct.

* * * *

[847] Q. Well, the way you decide who can become member of your tour is to use that qualifying tournament to select those players, is that right?

A. If you—if that's what you mean by the term selection, yes, I guess so.

Q. All right. And then until 1990, that Q school was used to determine eligibility just for the regular tour, because the Nike Tour wasn't in existence yet?

A. That's correct.

Q. Now, would you agree that the most competitive tournament that you conduct is Q school, because it is going to be what the players score in that tournament which will determine whether that player gets to play at all on your tours?

A. The most competitive?

Q. Yes.

A. I don't know how I can distinguish between levels of Competition. If you think—if you're saying does it mean the most—I don't know how to answer that. I guess you could argue it does. On the other hand, one tournament [848] during the year when a player is competing to maintain his exemption is just as important, or a player who is in a position if he performs at a certain level to earn entry into the invitational tournaments in the major championships. So that's just a subjective evaluation. I will say that it's an important competition, because it does determine access to the PGA Tour.

Q. And from a player's standpoint, which I guess would be the way you'd have to look at it, it's very important to the

players in the qualifying tournament that everybody play by the same rules, isn't it?

A. Yes.

Q. Now, am I correct, then, that from approximately 1965 to 1990, you let players who were proving their ability to play on the regular tour use carts in all stages of the qualifying tournament?

A. That's correct.

Q. And then from 1990, when the Ben Hogan Tour began, until 1997, you let players who were proving their ability to play in both the Nike and the PGA Tours use carts in all stages?

A. That's correct.

Q. And in those years, from 1965 to 1997, over 30 years, you tried to have the qualifying tournament mirror the official tournament as much as possible, but you didn't [849] think it was important to test walking?

A. No, I would say we didn't think it was important to test walking. Walking is an integral part of the competition as it's mixed in with all the other aspects of the challenge. We made a compromise on walking in the qualifying tournament for a variety of reasons, but I would not say it's fair to say that we didn't think it was important.

In fact, when we reviewed it three years ago, we made the determination that it was so important that it should be reinstituted, at least at the final level, even though we recognized the logistics made it very difficult at the first and second stage, and we made that change so that in 1997, at that qualifying tournament, walking was required in the finals.

Q. That was in March of 1997 that you made the—

A. That's when the board made me final determination to approve the plan that we had forwarded sometime in 1996.

Q. Now, it is the PGA Tour itself that conducts the qualifying tournament, isn't it?

A. Yes, it is.

Q. And your hard card is effective in those tournaments?

A. Yes, it is.
Q. In all stages?
A. Yes, it is.

* * * *

[850] But the players weren't required to follow the requirement on the hard card that they walk?

A. No.

Q. Now, in those 30 years, if a player wanted to walk, and carry his clubs, he was prohibited from doing so, wasn't he?

A. Caddies have always been required on the PGA Tour.

* * * *

Q. The player would actually be prohibited from walking carrying his clubs?

A. That's correct.

* * * *

[853] Q. During the 30 years that you operated the Q school, from '65 through '97, you made the Q school golfers play under conditions that included narrow fairways, et cetera?

A. My understanding is that the PGA Tour is always taking steps to have the qualifying tournament competition reasonably mirror, as much as possible and feasible, the PGA Tour competition, yes.

Q. Including those items I just stated?

A. Yes.

Q. Okay. But your position is that you had not tested walking because you wanted to save the participants money?

A. No, I don't think I said that.

Q. Okay. Is that part of the reason?

A. I think some people on our boards currently think that was a reason. I think that the logistics of having 1100 people play with caddies is a very difficult thing to administer and require at multiple sites around the country. Cost is a factor, but it just is one of the factors involved in the administrative difficulty of making that a requirement, as it is sometimes on Monday qualifying, and that's why we have over the years

not required it until two years ago, when we made the determination that once you got to the.final stage you were so close to playing on the PGA Thur, we should take the

[864] Q. Now, in Q School, in the first two stages, and for 30 years all stages, some—you permitted some to ride and some to walk, and you didn't have a concern about a perception that some were having an advantage, did you?

A. I think—I think that everyone was permitted. We didn't permit some to ride and some to walk. Everybody was permitted to have a cart who wanted a cart.

* * * *

[871] A. Well, we could. Some of them still have to. But we also provide them, if they're an exempt player, we provide them the ability to pick up some of the access they lost by virtue of the injury.

Q. And before you put that into effect they did have to come back to Q school and prove themselves?

A. Well, they had to do whatever they had to do. There was no—there was no additional access provided them because of an injury.

Q. Right. But normally they would have had to be in one of the other either top 125 money-makers, let's use the regular PGA Tour, they would have to be in the top 125, and it they couldn't be because of their injury, their only way back in was to go to Q school?

A. That's correct.

Q. And if they didn't have to go to Q school, that would give them an advantage over other players who did have to go to Q school, wouldn't it?

A. Well, I guess so. But the way we look at it is that here's a player that is fully exempt for the year.

* * * *

[873] Q. Shot-making is obviously the primary skill of professional golfers.

A. I think from a skill standpoint, you'd have to admit that what—the key element of skill in the game of golf is shot-making, yes.

Q. Golf carts have become a part of the game of golf in the last 30 to 40 years.

A. Absolutely.

Q. In fact—

A. But I, again, counselor, I would, when we're talking about the PGA Tour, we're not talking about the, quote, game of golf, in my judgment. We're talking about 370 players out of the 25 million who play, and I would reiterate on the skill question that, yes, it's—that is the skill issue. But the challenge of the sport is a combination of executing with that skill golf shots under tremendous pressure, faced with significant physical challenge.

* * * *

[876] T. Finchem-ReD

* * * *

Q. Mr. Finchem, you were asked by counsel if you knew of any document that the PGA Tour had that said that walking was an essential—or I think counsel called it fundamental part of the game. And you said no, you didn't know of any document that said that.

Do you know of any document, sir, that says that anything is a fundamental part of the game?

A. No.

Q. The hard card that we've been talking about, Mr. Finchem, has the hard card, or its equivalent, contained the walking requirement since the inception of the Tour, to the best of your knowledge?

A. Yes, it has.

* * * *

[878] Finchem-ReD

Q. Okay. Now, counsel asked you about your discretion as commissioner under certain circumstances to waive

temporarily portions of the tournament regulations. Again, same question, Mr. Finchem. Does that discretion extend to you the right to waive or alter conditions of the competition or rules of golf generally applicable to the competitions?

A. No.

* * * *

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No. 00-24

IN THE

Supreme Court of the United States

NOV 13 2000

PGA TOUR, INC.,

Petitioner,

v.

CASEY MARTIN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181 *et seq.*, governs job-related standards for persons (here, professional golfers) working at places of public accommodation.

2. Whether, if so, Title III requires professional sports organizations to grant selective waivers of their substantive rules of athletic competition in order to accommodate disabled competitors.

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IN THE

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No. 00-24

PGA TOUR, INC.,[1]

Petitioner,

v.

CASEY MARTIN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (J.A. 34-48) is reported at 204 F.3d 994. The opinions of the district court (J.A. 49-73, 74-88) are reported at 994 F. Supp. 1242 and 984 F. Supp. 1320.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 6, 2000. On May 17, 2000, Justice O'Connor extended the time to file a petition for a writ of certiorari to and including July 5, 2000. The petition was filed on July 5, 2000, and was granted on Septem-

[1] Petitioner, PGA TOUR, Inc., does not have any parent corporations, subsidiaries, or affiliates that have issued shares to the public.

ber 26, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* are set forth in the appendix to the petition at Pet. App. 56a-96a.

STATEMENT

This case raises the questions whether respondent may invoke the "public accommodations" provisions of Title III of the Americans with Disabilities Act (the "ADA" or "the Act"), 42 U.S.C. §§ 12101 *et seq.*, to challenge the substantive competitive rules established for professional golfers at tournaments conducted by the PGA TOUR, and, if so, whether Title III compels the Tour to grant selective waivers of its substantive rules in order to accommodate disabled competitors. The district court held that Title III of the Act did apply to this claim and that Title III mandated waiver of a substantive rule unless it could be shown that the waiver would give the disabled competitor an unfair advantage over a hypothetical able-bodied competitor. The court of appeals affirmed.

A. The issues in this case arise out of a challenge by respondent, a disabled professional golfer, to a requirement that he comply with all of the competitive rules applicable to certain golf tournaments sponsored by PGA TOUR, Inc. (the "Tour")—including, specifically, the so-called "walking rule," which requires golfers to walk the golf course during the competition. These elite tournaments, which are part of the PGA TOUR and the Buy.com TOUR (formerly the NIKE TOUR) and watched by spectators both in person and on television throughout the world, test the ability of professional golfers to perform at the highest levels of golf competition.[2] Of the approximately 25 million golfers in the United States, only about 200 are eligible to play in PGA TOUR events each year, and only about an additional 170 are eligible to play in Buy.com TOUR events. Both PGA TOUR and Buy.com TOUR competitions are, by design, among the most difficult and challenging golf tournaments in the world.

The Rules of Golf provide that "[t]he Game of Golf consists in playing a ball from the *teeing ground* into the hole by a *stroke* or successive strokes in accordance with the Rules." *See* J.A. 104; Rules of Golf, Rule 1.1. Those "Rules," which come from several different sources, become increasingly demanding as the level of competition rises.[3] With respect to the Tour events at issue in this case, the Tour requires competitors to observe a set of substantive rules that are intended to reflect the highest level of competition. In addition to other rules specified by the "hard card" (*see* note 3 *supra*), therefore, the Tour invokes several of the optional rules from the Rules of Golf, which are explicitly intended to make competitions more exacting.[4] For example, the Tour makes

[2] PGA TOUR, Inc., a non-profit entity formed in 1968 to promote high-level golf competition and golf tournaments, sponsors golf competitions on three professional golf tours: the PGA TOUR, the Buy.com TOUR, and the SENIOR PGA TOUR. Respondent is not eligible to compete on the SENIOR PGA TOUR, which is limited to golfers age fifty and older, and this lawsuit involves only PGA TOUR and Buy.com TOUR (formerly NIKE TOUR) events. J.A. 245-46. All references herein to "Tour events" and the like are to tournaments on those tours, not on the SENIOR TOUR.

[3] The rules governing Tour competitions come from three sources: (1) the Rules of Golf, as promulgated by the United States Golf Association ("USGA"); (2) the Conditions of Competition and Local Rules (the so-called "hard card"), containing additional rules applicable specifically to all Tour events; and (3) the Notice to Competitors, containing certain tournament-specific rules. J.A. 246-47.

[4] Among the rules prescribed by the "hard card" is a rule requiring competitors to use only "conforming" golf ball brands that satisfy objective USGA standards. This rule eliminates the competitive differences that would result if players used widely differing golf balls.

competitors adhere to the "one-ball rule," requiring that they use the same brand and type of golf ball throughout a round. *See* J.A. 122. Taking account of the fact that different types of golf balls perform differently in wind and other conditions when struck by highly-skilled golfers, this rule makes the competition more challenging by preventing a competitor from, among other things, using one type of ball when hitting into the wind, and another type when hitting with the wind. The violation of any substantive rule results in a penalty or disqualification. *See* J.A. 104-26.

The Tour competitions—like every other elite golf competition in the world—require that players walk the golf course during tournaments.[5] This "walking rule," which has been part of Tour events from their inception, is specifically intended to add the element of physical stress and fatigue to the competition. *See* J.A. 174, 245-46, 248-49. During four days of competition, a golfer typically must walk twenty to twenty-five miles, often in intense heat, in inclement weather, or over hilly terrain. The cumulative fatigue resulting from this requirement may, and frequently does, affect golfers' concentration, shot-making ability, and overall performance. *See* J.A. 169-70, 177-78, 190, 193-94, 234-36. The extent of such fatigue is impossible to quantify but will vary from golfer to golfer, depending upon factors like weather conditions, temperature, the terrain of the golf course, different golfers' psychological ability to cope with stress, the golfers' age and extent of physical conditioning, and so forth. J.A. 210-11.[6]

[5] The PGA TOUR "hard card" provides: "Players shall walk at all times during a stipulated round unless permitted to ride by the PGA TOUR Rules Committee." The Buy.com TOUR "hard card" contains virtually identical language. (This rule, without the "unless" clause, is set forth in the Appendix to the Rules of Golf. J.A. 125.) The Rules Committee can permit players to ride only in those limited instances when, due to unusual course configuration or for safety reasons (*e.g.*, crossing streets), it is deemed appropriate to shuttle all players short distances during an event. The Rules Committee cannot permit, and never has permitted, a competitor to use a golf cart in the competition itself. J.A. 253-54.

The Tour has long maintained that, to ensure the integrity of its competitions and to maintain public confidence, all competitors must observe the substantive rules established for a particular tournament. As a result, the golfers participating in Tour events are required to compete under the same conditions. No competitor is given an allowance or advantage because of differences in strength or other physical characteristics. Tournament officials monitor each Tour event, and players themselves are obligated to report any violation of the rules.

B. Respondent Casey Martin is a professional golfer who suffers from Klippel-Trenaunay-Weber Syndrome, a congenital vascular condition that precludes blood from properly re–circulating up his right leg. This condition interferes with his ability to walk, and causes him pain. Respondent thus has difficulty in walking the required distances in professional golf tournaments sponsored by the Tour.

In 1997, respondent entered the Tour's National Qualifying Tournament, which is used to select members for the NIKE TOUR (now the Buy.com TOUR) and PGA TOUR. At the final stage, during which the "walking rule" was invoked, respondent sought permission to use a golf cart. The Tour, in accordance with its rules, denied the request. Respondent then filed this action, pursuant to 28 U.S.C. § 1331, seeking a preliminary and permanent injunction

[6] The Tour also takes steps to make the course conditions for its high-level events more adverse than usual. For example, the rough (the area beside the fairway) is grown longer than normal, pins are placed in more difficult positions on the greens, and tee boxes are moved back to maximize the distance on each hole. The Tour uses these and other measures to define the nature of its high-level competitions, distinguishing them from recreational golf and other less exacting competitions, including its own SENIOR TOUR. J.A. 258-59.

against enforcement of the "walking rule" in the Qualifying Tournament and in subsequent Tour competitions for which he qualified.

Respondent alleged that the refusal of the Tour to waive the "walking rule" violated both Title I and Title III of the Act. His "Employment Discrimination" claim under Title I asserted that he was a "qualified individual with a disability," J.A. 96; *see* 42 U.S.C. § 12111(8),[7] and that the Tour had "discriminated against him because of his disability in regard to job application procedures, hiring, advancement, employment compensation, job training and other terms, conditions, and privileges of employment." J.A. 96; *see* 42 U.S.C. § 12112(a).[8] His "Public Accommodation Discrimination" claim under Title III alleged, among other things, that the Tour had failed "to provide [respondent] with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others on the NIKE and PGA TOURS." J.A. 94; *see* 42 U.S.C. § 12182(a).[9] With respect to both claims, respondent stated

[7] Section 12111(8) reads: "The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."

[8] Section 12112(a) reads: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."

[9] Section 12182(a) reads: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." Respondent also sought relief under 42 U.S.C. § 12189, claiming that the NIKE TOUR was a course or examination related to professional credentialing and that the "walking rule" constituted discrimination in this examination.

that "[b]ecause of his disability, [he] cannot effectively compete in the NIKE TOUR or the PGA TOUR or obtain compensation, benefits, privileges or advantages from the NIKE TOUR or the PGA TOUR unless he is permitted to use a golf cart in the NIKE or PGA TOUR events." J.A. 93.

The district court rejected the Title I claim, finding that respondent was an independent contractor, not an employee of the Tour, and thus not covered by Title I. J.A. 58. The court held, however, that Title III required a waiver of the "walking rule." In reaching this conclusion, the district court first resolved the threshold issue whether Title III, which addresses the equal enjoyment of goods and services at "places of public accommodation," applies to *competitors* in a sporting event viewed by the public, determining that Title III extends not just to "those areas actually accessed by the public at large," J.A. 85, but also to the "playing area" as well. J.A. 86. Based on that theory, the court concluded that Title III required organizations operating places of public accommodation to modify their policies for persons competing within the playing area, as well as for spectators and other attendees at the event. J.A. 87-88.

The district court further held that a waiver of the "walking rule" for respondent would not "fundamentally alter" the nature of Tour events. *See* 42 U.S.C. §12182(b)(2)(A)(ii).[10]

[10] Section 12182(b)(2)(A)(ii) defines as discrimination: "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would *fundamentally alter* the nature of such goods, services, facilities, privileges, advantages, or accommodations" (emphasis added).

The court acknowledged that the "walking rule" is a substantive rule of Tour events—that is, a rule that is intended to, and does, potentially affect the outcome of the tournaments—expressly finding that its purpose is to affect performance in those competitions by "inject[ing] the element of fatigue into the skill of shot-making." J.A. 65-66. Notwithstanding that finding, however, the court agreed that it was proper to make "an individualized inquiry into the necessity of the walking rule *in Casey Martin's case* . . . ," J.A. 62 (emphasis added), asking whether his use of a golf cart would give him an unfair competitive advantage. After stating that, for an able-bodied competitor, "the fatigue factor injected into the game of golf by walking the course cannot be deemed significant under normal circumstances," J.A. 66, the district court concluded that, because of his disability, the "fatigue [Martin] endures . . . is undeniably greater than the fatigue injected into tournament play on the able-bodied by the requirement that they walk from shot to shot." J.A. 68. The court thus decided that the purpose of the "walking rule"—to subject competitors to the added element of physical stress and fatigue—was satisfied with respect to respondent by virtue of his disability, and it enjoined the Tour from requiring him to comply with the rule.

C. The Ninth Circuit affirmed. Like the district court, it first declined to draw a distinction, for purposes of applying Title III, between competitors within the playing area of a golf course and spectators in areas open to the general public. Although the Ninth Circuit acknowledged the argument that a golf course during a professional tournament is not being used as a "place of exercise or recreation," *see* 42 U.S.C. § 12181(7)(L), it did not actually resolve whether that fact took the golf course outside the definition of a "public accommodation," instead stating that "[i]f a golf course during a tournament is not a place of exercise or recreation, then it is a place of exhibition or entertainment [*see* 42 U.S.C. § 12181(7)(C)]." J.A. 38. Having reached that conclusion, it went on to decide that Title III applied equally to players competing for prize money as part of Tour events and to persons enjoying those events as spectators. Dismissing arguments to the contrary, the court declared that there was no "justification for drawing a line between use of a place of public accommodation for pleasure and use in the pursuit of a living." J.A. 41.

The Ninth Circuit then held that a waiver of the "walking rule" for respondent would not impermissibly transform Tour competitions. Although the Ninth Circuit did not question that the "walking rule" was a valid substantive rule, J.A. 42-43, it rejected the argument that the waiver of any substantive rule—by destroying the uniformity of rules for all competitors—fundamentally alters the nature of a high-level athletic competition. Rather, the court of appeals conducted a two-part inquiry into, *first*, whether the rule at issue was a "fundamental" rule and, *second*, whether a waiver of the rule for respondent would give him an "unfair advantage." J.A. 46; *see also* J.A. 45 ("[t]he issue here is not whether use of carts generally would fundamentally alter the competition, but whether the use of a cart by Martin would do so"). Pointing to the district-court finding that the fatigue caused by walking during a golf tournament "cannot be deemed significant under normal circumstances," J.A. 43 (internal quotation marks omitted), the Ninth Circuit saw no basis for accepting that "walking is fundamental to the competition." J.A. 45. The court then compared the fatigue suffered by respondent with a golf cart to the fatigue suffered by "able-bodied" golfers without one, ultimately concluding that "providing Martin with a golf cart would not give him an unfair advantage over his competitors." J.A. 48.[11]

[11] The Ninth Circuit did not address respondent's alternative arguments, rejected by the district court, that respondent was an employee of

SUMMARY OF ARGUMENT

The decision of the Ninth Circuit is incorrect for two independent reasons. *First*, Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181 *et seq.*, provides no basis for claims of discrimination by persons, like respondent, who are not "clients or customers" of a public accommodation. *Second*, even if it did, Title III would not require the Tour to "fundamentally alter" the nature of its championship-level competitions by allowing different competitors to play by different substantive rules.[12] Either ground is sufficient to reverse the judgment below.

I.

The PGA TOUR is "part of the entertainment industry, offering competitive athletic events to the public . . . ." J.A. 79. The claim brought by respondent, a disabled professional golfer, seeks to alter the rules established for those "competitive athletic events"—in particular, to obtain an individual waiver of the "walking rule"—so that he can perform as part of the events themselves. The nature of this claim, however, brings it outside the ambit of Title III. As the language, legislative history, and structure of the Act make clear, Title III is intended to confer enforceable rights on clients and customers of places of public accommodation, not on persons working to provide those clients and customers with the relevant goods and services.

The subject to which Title III is addressed is discrimination in the marketplace. Whereas Title I of the Act deals directly

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the Tour covered by Title I and that the Buy.com TOUR competitions were a "course or examination" under Title III. J.A. 48 n.10.

[12] As the term has been used in this litigation, a substantive rule is a rule that is intended to, and potentially does, affect the outcome of a particular competitive event. The term is used to distinguish those rules from various rules that are not intended to affect the outcome—for example, rules of dress or decorum.

and extensively with issues of bias with respect to job-related terms and conditions—though affording no relief to respondent who, as an independent contractor, does not fall within its terms—Title III is concerned with discrimination against persons seeking to obtain goods and services at places of public accommodation. It is those customers that bring Title III into play, by making a private business into a "public accommodation," and it is those customers that, unlike persons working at places of public accommodation, are naturally said to "enjoy" the goods and services that the public accommodation has to offer. *See* 42 U.S.C. § 12182(a). Respondent is not in that category. Like a concert hall performer, or actor in a theatre production, respondent is helping to supply the entertainment at Tour events, not seeking to enjoy it.

This general understanding of Title III is reinforced by more specific provisions, which demonstrate that its protections extend only to customers, not workers, at places of public accommodation. Those provisions, enacted to make clear that a public accommodation neither diminishes nor enlarges its obligations by entering into contractual arrangements, specifically limit the scope of those obligations to its "clients or customers." *See* 42 U.S.C. § 12182(b)(1)(A)(iv). This limitation would be unexplainable if Title III generally covered other persons as well. Furthermore, insofar as persons working at public accommodations are concerned, these provisions detailing obligations to "clients and customers" stand in direct contrast to the comparable provision in Title I protecting "applicant[s] or employee[s]" against discrimination by means of contractual arrangements. *See* 42 U.S.C. § 12112(b)(2). The natural inference to be drawn from these different terms is that job-related discrimination at private entities is the subject of Title I, not Title III.

The legislative history confirms that fact. The relevant House Report states unequivocally that "Title III is not intended to govern any terms or conditions of employment by

providers of public accommodations or potential places of employment; employment practices are governed by title I of this legislation." H.R. Rep. No. 101-485, pt. 2, 101st Cong., 2d Sess. 99 (1990). Consistent with that plain statement, the analysis of Title III discusses the ability of the public (*i.e.*, clients and customers) to gain full access to goods and services, making no mention of discrimination with regard to job terms and conditions. The analysis of Title I is completely different: it is concerned with addressing impermissible discrimination in the workplace.

The application of Title III to persons (like respondent) providing goods and services at a place of public accommodation would also unsettle the balance struck in the Act as a whole. As it has done in other civil rights laws, Congress generally limited the scope of job-related protections to certain workers ("employees") and certain private businesses (largely those with 15 or more employees). If Title III is read to reach beyond those limits—for example, to protect independent contractors and employees at very small businesses—it will expose a wide variety of businesses, all of those covered by the broad definition of "public accommodation," to claims about possible workplace discrimination deliberately left uncovered by Title I. Indeed, plaintiffs in these newly-created lawsuits, by proceeding under Title III, could evade the procedural requirements established in Title I, including the obligation to file a charge with the Equal Employment Opportunity Commission. *See* 42 U.S.C. § 12117(a). Nothing in Title III, or in the Act as a whole, justifies this unnatural result.

II.

Title III, even if it applies to this claim, does not require entities operating places of public accommodation to "fundamentally alter" the nature of their goods or services. Although the Ninth Circuit acknowledged this fact, *see* J.A. 41, it utterly failed in its obligation to look closely at the nature of

the good or service (the "competitive athletic events") offered by the Tour. *See Southeastern Community College v. Davis*, 442 U.S. 397 (1979); *Olinger v. United States Golf Ass'n*, 205 F.3d 1001 (7th Cir. 2000), petition for certiorari (No. 00-434) filed September 20, 2000. Had it done so, it would have recognized that the highest-level Tour competitions, like other comparable sports competitions, must be able to test the physical capability of all competitors according to a uniform set of substantive rules. *See Olinger*, 205 F.3d at 1005-07.

Most notably, the Ninth Circuit paid no attention to perhaps the most fundamental attribute of elite sports competitions: that all competitors are required to play by the same substantive rules. The goal of the highest-level competitive athletics is to assess and compare the performance of different competitors, a task that is meaningful only if the competitors are subject to identical substantive rules. For that reason the Tour, in its elite events, has never allowed any player to compete without observing the full measure of such rules applicable to all other competitors. The same is true for all professional or other championship-level sports: no sport grants waivers of its substantive rules to selected players.

The Ninth Circuit also disregarded a second elemental aspect of high-level sports: that they are tests of physical performance. That fact is central to evaluating a claim that a particular rule puts a particular competitor at a physical disadvantage. In contests of physical skill, it is inevitable that the requirements established for the competition will burden different competitors differently, precisely because they come to the competition with different physical strengths and weaknesses. That "inequality" simply reflects the varying challenges faced, to one extent or another, by all athletes in the highest-level events.

The Ninth Circuit, by neglecting these critical aspects of high-level sports, never came to a necessary understanding of the "nature" of Tour events. Instead, it engaged in a two-part

"balancing" test, asking whether a particular substantive rule is "fundamental" to the competition and whether a waiver of the rule would give the disabled competitor an "unfair advantage." But this analysis begins with a dubious premise: that, in applying Title III to professional sports, judges can and should create a more level playing field for competitors of different physical ability. Even if the questions asked by the Ninth Circuit could be answered accurately and objectively, the enterprise is flawed: the attempt to correct for individual physical disadvantages fundamentally alters the nature of elite sports competitions.

The inquiry conducted by the Ninth Circuit is also inherently standardless and subjective. The Ninth Circuit did not, and reasonably could not, explain how to tell a fundamental substantive rule from a non-fundamental one. Although it relied on a finding that the fatigue caused by walking "cannot be deemed significant under normal circumstances," J.A. 43, that carefully-worded finding, even read on its own terms, actually acknowledges that the "walking rule" does have an effect, sometimes a significant effect, on the outcome of golf tournaments. The importance of the rule is reinforced by the fact that it is observed, not just in the highest-level Tour events, but in every other comparable golf tournament throughout the world.

There is also no reliable way to decide, on a hypothetical basis, whether competitors obtaining waivers of a substantive rule have a "competitive advantage" over other competitors without a waiver. The nearly infinite variety of physical attributes of different athletes prevents such a comparison. Although the Ninth Circuit purportedly undertook that inquiry, it made no attempt to address the relative disadvantages of those golfers suffering from debilitating (though not necessarily "disabling") conditions, thus leaving out of the equation numerous golfers that would benefit greatly from being allowed to ride in a cart rather than having to walk the course

during a four-day tournament. Instead, it required a comparison between the disabled competitor and a hypothetical "able-bodied" competitor. Even if that comparison could be made, however, the results would be uncertain and, in any event, beside the point: Tour events test actual (not hypothetical) physical performance under uniform rules, and any selective waiver of those rules fundamentally alters the nature of Tour events.

ARGUMENT

I. TITLE III OF THE AMERICANS WITH DISABILITIES ACT PROVIDES NO BASIS FOR CLAIMS OF DISCRIMINATION BY PERSONS, LIKE RESPONDENT, WHO ARE NOT CLIENTS OR CUSTOMERS OF A PUBLIC ACCOMMODATION.

The first problem with the decision below is its erroneous, and potentially far-reaching, determination that Title III of the Act applies to a claim that challenges job-related terms and conditions at a place of public accommodation. This holding is both contrary to the language of Title III itself, which plainly indicates that its provisions are aimed at prohibiting discrimination against clients and customers of public accommodations, and inconsistent with the legislative record, which unequivocally confirms that "Title III is not intended to govern any terms or conditions of employment by providers of public accommodations . . . ." H.R. Rep. No. 101-485, pt. 2, 101st Cong., 2d Sess. 99 (1990) (House Report). Furthermore, it upsets much of the legislative balance reflected in the broad, but not unbounded, reach of Title I.

A. It is important, at the outset, to understand both the nature of Tour events and the specific claim asserted by respondent. As the district court observed, "the Tour is part of the entertainment industry, *offering competitive athletic events to the public*, which in turn generate sponsorship of the events,

network fees, advertising revenue, and ultimately, the tournament prize money awarded the competitors." J.A. 79 (emphasis added). Respondent does not claim that he is prevented from attending these "competitive athletic events" on equal terms with other members of the "public." Rather, he asserts that the refusal of the Tour to waive its rule requiring all competitors to walk during tournaments prevents him from earning his living *as a player in those events*. Specifically, respondent is alleging that he "cannot effectively compete [in Tour events] or obtain compensation, benefits, privileges or advantages from [Tour events] unless he is permitted to use a golf cart in [those events]." J.A. 93. Respondent thus seeks the opportunity to work in Tour events, not to watch them.

This claim, on its face, is nothing more than a straightforward discrimination-in-the-workplace complaint, charging that the failure of a business to adjust the terms and conditions for a particular job (*i.e.*, a player in Tour events) has the effect of excluding a disabled worker. As such, it might be expected to fall within the province of Title I of the Act, which directly and comprehensively addresses workplace bias. The text of Title I broadly prohibits discrimination against a "qualified individual with a disability" with respect to "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). It further defines the term "qualified individual with a disability" in job-related terms, *i.e.*, whether the disabled person can, with or without accommodation, "perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The specific anti-discrimination provisions of Title I then detail various forms of bias in the workplace, commonly and repeatedly speaking in terms of "job applicant[s] or employee[s]" (*id.* at § 12112(b)(1)), "equal jobs or benefits" (*id.* at § 12112(b)(4)), "employment opportunities" (*id.* at § 12112(b)(5)(B)), "job-related"

standards or criteria (*id.* at § 12112(b)(6)), and the like. *See Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997) (employment practices are governed by Title I of the Act).

The problem for respondent, however, is that Title I, while granting extensive protection to disabled workers, contains certain well-established limitations. For one thing, it generally applies only to employers with at least 15 employees. More important here, Title I, like other comparable civil rights laws dealing with workplace discrimination, *see, e.g.*, 42 U.S.C. § 2000e-2(a) (Title VII of the Civil Rights Act of 1964), applies only to employees, not independent contractors. *See Birchem v. Knights of Columbus*, 116 F.3d 310, 312 (8th Cir. 1997) (Title I of the ADA does not apply to independent contractors). Thus, although respondent invoked Title I to get a judicially-compelled waiver of Tour rules, his effort was unsuccessful: the district court made the factual determination that respondent, like all other Tour players, is an independent contractor rather than an employee. J.A. 58.

That ruling should have ended the matter. It did not, however, because the district court (and then the Ninth Circuit) turned to Title III of the Act (the "public accommodations" section) as a way to provide the very relief found unavailable under Title I.[13] Placing great weight on the fact that Tour events are played at places generally defined as public accommodations—either because the golf courses are "place[s] of exercise or recreation," 42 U.S.C. § 12181(7)(L), or, more plausibly, because they are (during a tournament) "place[s] of exhibition or entertainment," 42 U.S.C. § 12181(7)(C) (*see* J.A. 38)—the courts below arrived at the conclusion that Title III can be read to dictate the terms and conditions established for *competitors* in tournaments held by the Tour at those

[13] The full heading of Title III is "Public Accommodations and Services Operated by Private Entities."

courses. In so doing, the Ninth Circuit refused to draw a distinction between spectators seeking to attend Tour events and golfers seeking to perform in those events, expressly holding that Title III applies equally to claims of discrimination "in the pursuit of a living." J.A. 41. *See also* Resp. Br. in Opp. 11 ("Congress extended the protections of Title III to all 'individuals' at public accommodations, *regardless of Title I's potential applicability* . . . .") (emphasis added).

This holding cannot be squared with the language and history of Title III. To begin with, it is out of step with the common understanding of what Title III is meant to deal with. It is, after all, the persons patronizing a business, not the persons working for it, who distinguish an entity that is a public accommodation from an entity that is not. *See* House Report, pt. 3, at 54 ("sufficient" that entity in specified category "sells items to the public"). Although many private entities engage in businesses affecting commerce, a private entity is defined as a "public accommodation" within the meaning of Title III, and thus subject to its provisions, only because it makes its goods and services available to the general public—as opposed to, for example, selling those goods and services exclusively at wholesale. *See* 28 C.F.R. ch. 1, pt. 36, App. B, at 623. Given that the customers of a business are what bring Title III into play, it stands to reason that its legal obligations run to those same customers as well. Simply (if loosely) put, it is discrimination against buyers, not within sellers, with which Title III is concerned.

The terms of Title III confirm that understanding. The focus of the anti-discrimination provisions of Title III is on prohibiting discrimination in the *marketplace*, not discrimination in the *workplace*. *See generally* 42 U.S.C. § 12182(a) (General Rule), § 12182(b)(1) (General Prohibition), § 12182(b)(2) (Specific Prohibitions). Title III seeks to assure "the full and equal *enjoyment of* the goods, services, facilities, privileges, advantages, or accommodations of [a] place of public accommodation." 42 U.S.C. § 12182(a) (emphasis added). The most natural reading of this language indicates that Congress meant to assure equal treatment for the customers of places of public accommodation—that is, persons seeking to purchase or otherwise obtain the relevant goods and services—who (rather than persons there to work) are more appropriately said to "enjoy[]" what the public accommodation has to offer. For example, while spectators at a concert hall are presumably "enjoying" the entertainment offered by a public accommodation, it is highly awkward to apply that same language to performers on the concert hall stage. Like the golfers at a Tour event, they are *providing* the entertainment, not enjoying it. *See also* Brief for Casey Martin, C.A. 9, at 56 (Tour "revenue is contingent on the PGA employing touring golf professionals such as Mr. Martin to entertain the public").

Although respondent has argued that the "plain language" of Title III extends to all "individual[s]" at places of public accommodation, including those engaged in providing goods and services there, *see* Resp. Br. in Opp. 10-11 (citing 42 U.S.C. § 12182(a)), the most pertinent textual evidence contradicts that assumption. Section 12182(b)(1)(A)(iv) of the Act, which deals with the problem of indirect discrimination against an "'individual or class of individuals' . . . [through] contractual, licensing, or other arrangement[s]," specifically defines the term "[i]ndividual or class of individuals" to mean the "*clients or customers* of the covered public accommodation that enters into [a] contractual, licensing or other arrangement," *id.* (emphasis added), a description that obviously excludes persons working there. This definition serves an important, and telling, purpose. The operative language in subsections (i) through (iii), to which the definition of subsection (iv) is addressed, is intended to make clear that a public accommodation cannot *narrow* its obligations under Title III by resorting to contractual or other arrangements. *See* House Report, pt. 2, at 104 ("the reference to contractual arrangements is to make clear that an entity may not do indirectly

through contractual arrangements what it is prohibited from doing directly under this Act"). The point of the definition in subsection (iv) is to make equally clear that use of contractual arrangements does not *enlarge* those obligations. *See* House Report, pt. 2, at 104 ("a public accommodation's obligations are not extended or changed in any manner by virtue of its lease with [another] entity"). In short, whether a public accommodation enters into a contractual arrangement or not, it remains obligated to exactly the same "individuals": its "clients or customers." *See* House Report, pt. 2, at 104 ("[a] store's legal obligations extends [sic] only to individuals in their status as its own clients or customers . . . .").

The definition in subsection (iv) thus makes evident that Congress meant Title III to address discrimination only against "clients and customers" at places of public accommodation. While the definition applies directly just to subsection 12182(b), there is no reason to think that Congress narrowly drafted that subsection to protect only part of a broader class of "individuals" more generally protected by Title III. Put another way, if Title III as a whole applied to persons other than clients or customers—for example, persons like respondent engaged in performing, or otherwise providing goods or services, at places of public accommodation—it would be reasonable to expect that Congress would protect *all of them* against possible discrimination by means of "contractual, licensing, or other arrangement[s]," and not limit that protection to clients and customers alone. This expectation is reinforced by looking at the comparable provision of Title I of the Act, which bars "participat[ion] in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified *applicant or employee* with a disability to the discrimination prohibited by this subchapter . . . ." 42 U.S.C. §12112(b)(2) (emphasis added). Not only does this language point up an obvious contrast between the "applicant or employee" covered by Title I and the "clients or customers" covered by Title III, but it confirms that Congress

fully recognized the potential for indirect discrimination against workers by means of contractual and other relationships. *See* House Report, pt. 2, at 59; pt. 3, at 36-37. Given that fact, it would be inexplicable, if Title III actually applied to persons other than clients and customers, for Congress to shelter only the latter, and not the former, from discrimination of this type.[14]

The legislative history, likewise, shows unmistakably that Title III is concerned with discrimination against customers, not workers. Most notable is language in the House Report, which states, in the plainest terms, that "Title III is not intended to govern any terms or conditions of employment by providers of public accommodations or potential places of employment; employment practices are governed by title I of this legislation." House Report, pt. 2, at 99. In keeping with this declaration, the analysis of Title III, like the text of Title III, contains no discussion of discrimination with respect to job terms and conditions, instead addressing the ability of the public (*i.e.*, clients or customers) to gain full and equal enjoyment of the goods and services provided by places of public accommodation. *See* House Report, pt. 2, at 99-129, pt. 3, at 53-69.[15] By contrast, the analysis of Title I in the House

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[14] This case does not involve the question whether Title III requires special treatment for a client or customer of a place of public accommodation who is simultaneously pursuing some job-related function (*e.g.*, doing research at a public library), above and beyond that extended to ordinary clients and customers. As explained in the text, respondent, insofar as he is part of the tournament itself, is not a client or customer at all.

[15] The House Report does indicate that the provisions in Title III dealing with new construction and alterations to existing facilities generally call for work and public areas to be made accessible to disabled persons at public accommodations and "commercial facilities." *See* House Report, pt. 2, at 116-21, pt. 3, at 62-66; 42 U.S.C. § 12183. The Report makes clear, however, that this provision is not meant to convert Title III into a counterpart of Title I, imposing a supplemental set of standards for individual employees at public accommodations. *See* House Report, pt. 2, at 117. "The legal requirements of the two titles . . . are separate and independent." *Id.*

Report, like the text of Title I itself, is replete with discussion about what constitutes discrimination in the workplace. *See* House Report, pt. 2, at 54-83, pt. 3, at 31-49.

The focus of Title III on clients and customers helps to explain why it confers no right to enter private areas (generally, work areas) at a place of public accommodation. Whether those areas are deemed separate from the place of public accommodation or treated as private spaces within it, *see* Brief of United States Golf Ass'n as *amicus curiae* at 8-19, the fact is that no "customer or client" of the public accommodation, disabled or not, is entitled to be there. As the USGA brief points out, for example, members of the public are invited to attend events at theatres and stadiums only as part of the audience; they are not given the privilege of going onto the stage or playing field. Each of those areas, like the area "inside the ropes" during a golf tournament, is reserved for persons performing what the audience is there to see. A claim seeking access to those areas thus cannot be brought as a client or customer seeking equal treatment with other clients and customers: it must be brought as a prospective performer (or other worker) seeking treatment not provided to clients and customers at all.

All this makes abundantly clear that Title III does not provide a basis for the specific claim brought by respondent. Whatever may be the actual merits of that claim, *see* pages 30-41 *infra*, respondent is not suing in the capacity of a "client or customer" at Tour events. At the professional golf tournaments put on by the Tour—where the golf course is temporarily diverted from its typical use as a "place of exercise or recreation" into a "place of exhibition or entertainment"—the "clients and customers" of the Tour, and thus the "individuals" to whom Title III is addressed, are the spectators and other attendees who are there to watch the tournament. Respondent is obviously not seeking to be placed on equal terms with them, but rather to be included among a

totally different group: the *golfers* paid to be part of the entertainment that the Tour provides.[16] In that respect, respondent is no different from an actor, or a musician, or, for that matter, any other prospective worker complaining of discriminatory practices at a place of public accommodation.[17]

The Ninth Circuit never came to grips with this basic fact. Although the court of appeals compared respondent to a student at a private university (J.A. 40)—another form of public accommodation under § 12181(7)(J)—the apt analogy is not to a student at the university, but to a teacher. Like respondent, a university teacher is working at a place of public accommodation in order to provide, or perhaps to be part of, the goods and services (there, education) that the clients and customers (there, the students) are meant to acquire. But the fact that the university hiring the teacher operates a place of public accommodation, and thereby comes within the reach of Title III insofar as its students are concerned, does not suddenly confer on the teacher a new bundle of discrimination-in-the-workplace rights that are unavailable to workers at other private businesses. The same is true here: when respondent seeks access to a golf course as a participant in Tour events, he becomes part of the business of providing entertainment to the spectators. His claim of discrimination

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[16] In the Title III section of his complaint, respondent specifically asserted that the Tour had failed to provide him "with a good, service, facility, privilege, advantage or accommodation or other opportunity that is as effective as that *provided to others on the NIKE and PGA TOURS*." J.A. 94 (emphasis added).

[17] The Justice Department has said that "performing artist[s]" at a theatre or concert hall may be subject to suit as defendants under Title III on the grounds that they are leasing, or otherwise operating, places of public accommodation. *See* 28 C.F.R. ch. 1, pt. 36, App. B, at 629. This view is plainly inconsistent with the idea that Title III treats performers in the same manner as members of the audience, who are potential plaintiffs, rather than defendants, under those provisions.

about job-related terms and conditions is thus cognizable, if at all, only under Title I, not Title III.[18]

B. The extension of Title III to work-related claims also upsets much of what Congress did in limiting the coverage of Title I to "employees" and "covered" employers. *See* 42 U.S.C. § 12112(a). Most particularly, it opens the door to numerous job-related claims by workers, like respondent, deliberately left uncovered by Title I. Indeed, that is precisely the result that respondent argues for. *See* Resp. Br. in Opp. 11. But the language and structure of the Act will not allow this end-run around Title I.

It is important to recognize that the limitations embodied in Title I of the Act are anything but unusual. In numerous civil rights laws, Congress has chosen to grant job-related protections mostly to "employees" of relatively large private employers. Like Title I here, the comparable provisions in Title VII of the Civil Rights Act of 1964 (from which the definitional provisions in Title I of this Act are generally taken, *see* House Report, pt. 2, at 54), and in the Age Discrimination in Employment Act, forbid discrimination with respect to "employment" and "employment opportunities," and against "employees or applicants" of covered employers (generally those with at least 15 employees), rather than against all workers in all work situations. *See* 42 U.S.C. § 2000e-2(a)(1), (2); 42 U.S.C. § 2000e(b), (f); 29 U.S.C. § 623(a)(1)-(3). Similarly, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, from which the substantive (though not the definitional) provisions of Title I are derived, *see* House Report, pt. 3, at 31, generally provides safeguards against discrimination with respect to "employment" and "employment

[18] A golfer seeking access to a golf course for its usual recreational purposes would, by contrast, be a "client or customer" of that public accommodation.

opportunities." *See Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 632-34 & n. 12 (1984).

This deliberate choice reflects an intent to create obligations for the benefit of common-law employees, and not other workers such as independent contractors. *See, e.g., Alexander v. Rush N. Shore Med. Ctr.*, 101 F.3d 487, 492-93 (7th Cir. 1996) (independent contractors not protected by Title VII of Civil Rights Act); *EEOC v. Zippo Mfg. Co.*, 713 F.2d 32, 38 (3d Cir. 1983) (independent contractors not protected by Age Discrimination in Employment Act). *See also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-27 (1992). Indeed, as this Court recently noted, Congress has shown little tolerance for judicial efforts to set aside that intent in favor of more sweeping interpretations. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. at 322-27; *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166-68 (1971); *see also Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-41 (1989). For example, after this Court expansively construed the term "employee" in the National Labor Relations Act—giving it a broad meaning "in the light of the mischief to be corrected and the end to be attained," *see NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 124 (1944) (internal quotation marks omitted)—Congress promptly revised the statute to make clear that this ends-oriented reading was unwarranted. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. at 324-25. The Ninth Circuit decision in this case, however, simply skins the cat a different way: by using Title III to reach the job-discrimination claim made by respondent (an independent contractor), it has similarly stymied efforts by Congress to target the workplace rights conferred by the statute to common-law employees. That result is at odds with the explicit terms of the Act.[19]

[19] The reading given to Title III below also fits poorly with the idea that the Act "extend[s] to [disabled persons] the same civil rights protections provided to women and minorities beginning in 1964." House Re-

It is also implausible to think that Congress actually meant Title III to cover what Title I so pointedly left out. Although this Court has recognized that Congress may deal with a single problem in multiple statutory provisions, *see generally North Haven Bd. of Ed. v. Bell*, 456 U.S. 512 (1982) (applying Title IX of the Civil Rights Act of 1964 to employment disputes), it has first looked closely at the text, and legislative history, of the relevant legislation to find persuasive evidence of that intention. *See North Haven Bd. of Ed.*, 456 U.S. at 520-35 (discussing statutory language and legislative history). *Cf. Menkowitz v. Pottstown Memorial Med. Ctr.*, 154 F.3d 113 (3d Cir. 1998).[20] Here, the evidence is all to the contrary: as we have discussed, *see* pages 18-22 *supra*, not only is the text of Title III totally silent about workplace discrimination, the legislative history states unequivocally that Title III is not meant to overlap with Title I. *See* House Report, pt. 2, at 99 ("Title III is not intended to govern any terms or conditions of employment by providers of public accommodations or potential places of employment; employment practices are governed by title I of this legislation"). Were that not enough, the relevant regulations reflect the same separation: the

port, pt. 3, at 26. Neither women nor older workers can turn to "public accommodations" laws as an alternative basis for job-discrimination suits because the Age Discrimination in Employment Act has no such provision, and Title II of the Civil Rights Act of 1964 (the "public accommodations" provision of that Act) does not apply to discrimination based on sex. *See* 42 U.S.C. § 2000a. And, while that latter section does apply to racial discrimination in public accommodations, it does not make any reference to employment discrimination at those places. *Id.*

[20] In *Menkowitz* the Third Circuit held that Title III provided a basis for a claim by a staff physician (an independent contractor) seeking hospital staff privileges. Although the result in that case may depend more on the nature of hospital privileges than on a general principle to be derived from Title III, the partial dissent correctly pointed out that, in any event, the majority failed to undertake a sufficient analysis of the interplay between Title I and Title III of the Act. *See id.* 125-28 (Scirica, J., dissenting and concurring).

regulations under Title I (promulgated by the Equal Employment Opportunity Commission) deal comprehensively with discrimination in the workplace, *see* 29 C.F.R. ch. xiv, pt. 1630, § 1630.1 *et seq.*, while the regulations under Title III (promulgated by the Attorney General) are concerned with assuring equal opportunity in the marketplace. *See* 28 C.F.R. ch. 1, pt. 36, § 36.101 *et seq.*[21]

The effort to extend Title III to workplace disputes also confounds common sense. It is hard to see why Congress would deliberately limit coverage in Title I of the Act only to expand it greatly—and with no mention of doing so—in Title III. And, if Congress had wanted to extend the protections of the Act to independent contractors (and to workers at businesses with only a small number of employees), why would it take that step only for places of public accommodation? It is much more likely that, if it had meant to grant this broader coverage, Congress would just have addressed the matter openly in Title I. Not only would that direct treatment have eliminated any confusion about its intentions, it would also have had the very real virtue of assuring that allegations of discrimination in the private workplace would be analyzed according to consistent, and job-specific, standards, rather than by a creative reading of provisions aimed at a wholly different problem.

Finally, the decision below ignores the fact that Congress had well-understood reasons for limiting coverage of the Act to certain workers and to certain covered employers. While Congress granted broad new protections to disabled persons,

[21] Section 504(d) of the Rehabilitation Act, in seeking to harmonize standards under that Act and the Disabilities Act, also focuses attention on Title I, not Title III. *See* 29 U.S.C. § 794(d). It provides: "The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12111 *et seq.*) and [certain provisions of title IV], as such sections relate to employment." *Id.* The section makes no mention of Title III in connection with "employment discrimination."

including disabled workers, it recognized that the Act, like other anti-discrimination laws, would give rise to a significant increase in litigation against private businesses. *See EEOC v. AIC Security Investigations, Inc.*, 55 F.3d 1276, 1281 (7th Cir. 1995). The Seventh Circuit has observed, for example, that the decision to limit covered entities to employers with at least 15 employees "struck a balance between the goal of stamping out all discrimination and the goal of protecting small entities from the hardship of litigating discrimination claims." *EEOC v. AIC Security Investigations, Inc.*, 55 F.3d at 1281; *see generally United Steelworkers of America v. Weber*, 443 U.S. 193, 206 (1979) ("Title VII [of the Civil Rights Act] could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business"). Congress struck a similar balance in extending the substantive protections of the Act, and the concomitant right to sue, only to workers defined as employees (or prospective employees), not to the millions of additional persons—many of them transitory or occasional workers—who offer their services as independent contractors. *See generally The New York Times*, October 11, 2000, at C5 ("As of February 1999, a total of 8.2 million workers—or 6.3 percent of the work force—were independent contractors, according to the Bureau of Labor Statistics").

The potential consequences of applying Title III to job-related requirements for all workers in all places of public accommodation are truly extraordinary. The definition of a "public accommodation" includes, among other things, most places of lodging, restaurants, retail establishments (grocery stores, hardware stores), service establishments (dry cleaners, lawyers' offices, pharmacies, doctors' offices), schools (from nursery through postgraduate), day-care centers, and gymnasiums. *See* 42 U.S.C. § 12181(7)(A)-(L). Many of those establishments, it may be assumed, have fewer than 15 employees and utilize, at least on occasion, independent contractors

to provide goods and services to the public. If respondent is correct, it would mean that hiring or other job-related decisions at each of those establishments—presently understood to be outside the scope of the Act—would suddenly be the basis of potential litigation, just like the decisions of employers that Congress deliberately made subject to coverage under Title I.[22] Indeed, workers (or potential workers) bringing claims under Title III would actually be in a *preferred* position because they could avoid the procedural requirements of Title I, including the directive to file a timely charge with the Equal Employment Opportunity Commission. *See* 42 U.S.C. §12117(a) (incorporating charge requirement for claims of discrimination under Title I). *See also Patterson v. McLean Credit Union*, 491 U.S. 164, 180 (1989) (rejecting expansive reading of 42 U.S.C. § 1981 in part because it would "undermine the detailed and well-crafted procedures for conciliation and resolution of Title VII claims"); *Zimmerman v. Oregon Dept. of Justice*, 170 F.3d 1169 (9th Cir. 1999), petition for certiorari (No. 99-243) filed August 10, 1999 (Title II does not apply to persons working at governmental facilities).[23]

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[22] Although this case involves only the application of Title III to a professional golfer working as an independent contractor, respondent draws no distinction between workers in that category and employees in businesses with fewer than 15 employees, *See* Resp. Br. in Opp. 11. In his view, the critical fact is not the type of worker, but the fact that he or she is working at a place of public accommodation. *See id.*

[23] There is a split among federal courts of appeals regarding whether Title II (the Public Services title) applies to the terms and conditions of employment for government workers. *Compare Zimmerman v. Oregon Dept. of Justice*, *supra*, with *Bledsoe v. Palm Beach County Soil & Water Conservation Dist.*, 133 F.3d 816 (11th Cir.), *cert. denied*, 119 S. Ct. 72 (1998); *Holmes v. Texas A & M Univ.*, 145 F.3d 681 (5th Cir. 1998); *Doe v. Univ. of Maryland Med. Sys.*, 50 F.3d 1261 (4th Cir. 1995). Because the wording and legislative history of Title II and Title III are quite different, the questions posed by those cases are not the same as the questions presented here.

There is no justification for this judicial restructuring of the Act. While Congress indisputably sought to expand employment opportunities for disabled individuals, it did so in a specific way, identifying the businesses and workers that it intended to make subject to the Act. By extending Title III beyond clients and customers to providers of goods and services as well, the Ninth Circuit read those limitations out of the Act, making Title III a backstop for claims of workplace discrimination not covered by Title I. This unwarranted expansion of the Act should not stand.

II. TITLE III DOES NOT REQUIRE THE TOUR TO FUNDAMENTALLY ALTER THE NATURE OF ITS CHAMPIONSHIP-LEVEL EVENTS BY ALLOWING DIFFERENT COMPETITORS TO PLAY BY DIFFERENT SUBSTANTIVE RULES.

A. The Ninth Circuit was also mistaken in holding that Title III requires professional sports organizations to modify their substantive competitive rules to accommodate disabled competitors. *See* note 12 *supra* (defining the term "substantive rule"). Even if Title III does extend to job-related claims, the modification of terms and conditions sought here—the waiver of a substantive rule of competition for one particular competitor—would fundamentally alter the nature of the competition itself. Paying too little heed to the importance of uniform rules in contests of physical skill, the court of appeals simply missed that essential point. *See Olinger v. United States Golf Ass'n*, 205 F.3d 1001 (7th Cir. 2000), petition for certiorari (No. 00-434) filed September 20, 2000.

Although the Act generally requires private entities operating places of public accommodation to make reasonable modifications to their policies in order to accommodate disabled persons, it contains an important limitation: those entities need not make modifications that "would fundamentally

alter the nature" of the particular goods and services being offered. *See* 42 U.S.C. § 12182(b)(2)(A)(ii). The critical question, therefore, is whether the waiver of a substantive rule for one competitor in an elite athletic competition fundamentally alters the nature of the competition. The Ninth Circuit decided that the answer depends upon a fact-intensive analysis, weighing the relative importance of the specific rule and the "individual circumstances" of the disabled athlete. *See* J.A. 45. But this approach misapprehends the proper statutory inquiry: to determine whether a proposed modification (waiver of a substantive rule) would "fundamentally alter the nature" of a particular good or service (the elite athletic competition), the inquiry must focus primarily on the nature of the good or service. Had the Ninth Circuit—like the Seventh Circuit in *Olinger*—given proper attention to that part of the equation, it would have recognized that the highest-level Tour competitions, like any other elite sports competition, must be able to test the physical capability of all competitors according to a uniform set of substantive rules.

The statutory point is a simple one: that a court cannot tell whether a particular change in policy will "fundamentally alter" the nature of a good or service without giving close scrutiny to what the basic nature of that good or service is. This Court followed just that approach in *Southeastern Community College v. Davis*, 442 U.S. 397, 410 (1979)—the decision from which the statutory phrase ("fundamentally alter") is derived (*id.*)—making clear that Section 504 of the Rehabilitation Act did not compel a business entity (there, a nursing school) to make a critical change in what it traditionally does. *See id.* at 410-11. In so doing, the Court placed special emphasis on the usual requirements of the particular nursing program at issue. *See id.* at 413 ("Section 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person"). *See also Alexander v. Choate*, 469 U.S. 287, 300 (1985) (noting "legitimate interests of federal

grantees in preserving the integrity of their programs"); *School Bd. of Nassau County, Florida v. Arline*, 480 U.S. 273, 287 n.17 (1987). Likewise, in *Olinger*, the Seventh Circuit recognized that Congress, in setting out the anti-discrimination provisions of Title III, did not intend to "require entities to change their basic nature, character, or purpose insofar as that purpose is rational, rather than a pretext for discrimination." *Olinger*, 205 F.3d at 1005. It then took care to examine the manner in which championship-caliber golf tournaments are conducted, ultimately deciding that uniform application of the "walking rule" was necessary to maintain the integrity of those events. *See Olinger*, 205 F.3d at 1006-07.

The need for a close look at what a particular enterprise actually does—that is, at the existing nature of the relevant good or service—is also reflected in regulations promulgated under Title III. For example, the Department of Justice has said that neither Title III itself, nor the applicable regulations, would "require the inventory of goods provided by a public accommodation to be altered to include goods with accessibility features." 28 C.F.R. ch. 1, pt. 36, App. B, at 641. Accordingly, in applying the "fundamentally alter" language of the Act, the Department has taken the position that a bookstore is not obligated "to stock Brailled books or order Brailled books, *if it does not do so in the normal course of its business*." *Id.* (emphasis added). This focus on "the normal course of [a] business" is then carried forth through other examples in the regulations, which similarly call for a careful inquiry to determine what the course of a particular business actually consists of. *Id.*

The inquiry conducted by the Ninth Circuit, however, was both one-sided and incomplete. Most significantly, the court of appeals paid no attention whatever to perhaps the most fundamental attribute of professional sports in general, and of elite golf tournaments in particular: that all competitors are

required to play by the same substantive rules. In our view, it is impossible to understand the "nature" of the highest-level athletics without considering, and assigning proper weight to, that fact. Given that the goal of athletic competition is to compare the performance of different competitors, it is critical to the legitimacy of that comparison that each participant perform the same set of prescribed tasks. J.A. 249-50. *See Olinger*, 205 F.3d at 1006 (evidence "supports the golf community's insistence that all players play all tournaments under the same conditions and rules").

That principle applies with full force to the championship-level events conducted by the Tour. As the Rules of Golf provide, "the Game of Golf consists in playing a ball from the *teeing ground* into the hole by a *stroke* or successive strokes in accordance with the Rules." J.A. 104; Rules of Golf, Rule 1.1. Prior to the injunction in this case, the Tour had never allowed any golfer to play in its highest-level tournaments (the competitions at issue here) without adhering to all of the governing substantive rules. Those rules include not just the numerous rules applicable to both elite and recreational golf, but also additional rules specifically designed to make the elite competitions more demanding. *See* pages 3-4 *supra*. The Tour imposes strict penalties for violation of the rules, ranging from the addition of strokes to disqualification from the tournament. *See* J.A. 104-07.

The Ninth Circuit also failed to acknowledge a second central aspect of high-level sports: that they are contests of *physical* performance. Yet the fact that professional sports test physical performance is highly relevant to evaluation of a claim that the rules of a particular sport unlawfully penalize physical disability. Despite the views of the Ninth Circuit, it is inevitable, even desirable, that the requirements of a professional sport will burden different players differently, precisely because they come to the competition with unequal physical attributes. Individual competitors may or may not be

able to compensate for those physical disadvantages, but, if they cannot, the resulting "inequality" is not discrimination in any meaningful sense (including the sense contemplated by Title III), but simply a reflection of the varying challenges faced, to a greater or lesser degree, by all athletes in elite athletic competitions. Those competitions reward superior physical performance, without adjusting the standards from competitor to competitor to allow for more equal results.

The Seventh Circuit, unlike the Ninth Circuit, took note of the basic character of competitive sports, observing that "[t]he point of an athletic competition . . . is to decide who, under conditions that are about the same for everyone, can perform an assigned set of tasks better than (not as well as) any other competitor." *Olinger*, 205 F.3d at 1006 (internal quotation marks omitted). *See also The American Heritage Dictionary of the English Language* at 1742 (3d ed. 1992) (defining "sport" as "[a]n activity involving physical exertion and skill that is governed by a set of rules or customs and often undertaken competitively"). Insofar as elite competitions are concerned, this view reflects a universal experience: no professional sport—not baseball, not tennis, not soccer, not basketball, not track and field—allows, or has allowed, a chosen competitor to play by different rules. The long consistent history of requiring adherence to uniform rules, both in golf and in other sports, reflects a shared understanding of what high-level athletic competition is all about: a test of physical proficiency for different competitors under identical rules. It follows, therefore, that any waiver of a substantive rule for a given competitor is out of keeping with the fundamental premise of professional sports.

The importance of uniform rules does not mean, as the Ninth Circuit supposed (J.A. 45), that professional sports organizations, merely by making up arbitrary rules, may exempt themselves from the Act. It remains entirely appropriate for a court to question whether a particular rule may, in fact, have a

possible (non-trivial) effect on the outcome of the athletic competition. (If not, it could be waived for *any* competitor, disabled or non-disabled, without changing the competition.) Thus, for example, the Seventh Circuit, while examining the nature of the United States Open golf championship, looked at the record both to determine that the rule was not a pretext for discrimination and to assure that the rule (and thus a waiver of the rule) could actually affect performance in the competition. Having assured itself on those points, however, the Seventh Circuit correctly acknowledged that professional sports organizations have a need for uniformity in the application of their substantive rules that is different from, and greater than, the need of business entities that do not, by their very nature, seek precisely to evaluate and reward differences in physical performance.[24] That is just the sort of careful analysis that the "fundamental alteration" standard calls for.

B. The Ninth Circuit took a very different view. Rather than give any weight to the importance of uniform rules, it held that it was free to grant waivers of any substantive rule for disabled competitors so long as it determined, *first*, that the particular rule was not "fundamental" and, *second*, that the waiver would not give the disabled competitor an "unfair advantage" over other competitors. This effort at redefining

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[24] This need for uniformity does not vary with the "individual circumstances" of a particular competitor, and an examination of those circumstances in this context is thus neither necessary nor justified. It may be appropriate, however, if the nature of the good or service in question is different. *See, e.g., Washington v. Indiana High Sch. Athletic Ass'n*, 181 F.3d 840 (7th Cir.), *cert. denied*, 120 S. Ct. 579 (1999). In *Washington*, for example, the court of appeals noted that the association had already provided for selective waivers of its eligibility rule, thereby demonstrating that uniform application of the rule was not integral to the nature of high school competition. In those circumstances, there was no evident reason not to make the same accommodation for qualified disabled athletes. *See also Sandison v. Michigan High Sch. Athletic Ass'n*, 64 F.3d 1026 (6th Cir. 1995); *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926 (8th Cir. 1994).

the competition, however, falls short on a number of different fronts.

To start with, we question the core premise upon which the Ninth Circuit proceeded: that, in applying Title III to professional sports, judges can and should create a more level playing field for competitors of different physical ability. As we have discussed, *see* pages 32-34 *supra*, the highest-level athletic competitions are designed specifically to test performance under common rules, rewarding those who achieve the best results with whatever physical attributes they do, and do not, bring to the competition. That (actual) contest is necessarily and profoundly changed by making it subject to a before-the-fact (imaginary) contest, with a judge evaluating each rule and each competitor to determine who can be excused from compliance with a particular rule without unduly skewing the possible results. However well-meaning, the enterprise itself is flawed: to correct for individual physical disadvantages fundamentally alters the essence of any high-level athletic competition.

This hypothetical comparison is also inherently unreliable and unworkable. Although the Ninth Circuit apparently believed it possible to decide whether a particular substantive rule is fundamental to a particular sport, this inquiry is doomed from the outset by the lack of any coherent standard to guide it. In this case, for example, all the court could point to as support was a finding that "the fatigue factor injected into the game of golf by walking the course cannot be deemed significant under normal circumstances." J.A. 43. But the most important thing about this finding is not what it rejects, but what it accepts: that the "walking rule" *does affect* the outcome of some high-level golf tournaments. *See also Olinger*, 205 F.3d at 1007.[25] Even taking the finding at face

[25] The effect need not be great to have a significant impact on the competition. In 1997, for example, the difference in average score between the number one and number 100 PGA TOUR scoring leaders was 2.32 strokes per round over the course of the entire year. Reporter's Transcript at 780-82.

value, it is common ground that the fatigue associated with walking the golf course during four rounds of a tournament may routinely have at least some effect—and, at times, may have a highly significant effect—on the competition. If not always decisive, therefore, it is an ever-present factor in the outcome of Tour events.

The reliance of the Ninth Circuit on this finding thus reveals the arbitrary character of its fundamental/non-fundamental rule test. Once it has been determined that a rule established for a particular competition is potentially "outcome-affecting"—as was the case here—it seems self-evident that the rule cannot be changed or eliminated without redefining the competition itself. Indeed, despite its ultimate conclusion, the Ninth Circuit never went so far as to say, and could not reasonably have said, that championship-level golf tournaments would be more or less the same without any "walking rule" at all. The "walking rule" has been an integral part of Tour competitions since their inception, J.A. 174, 245, 248-53, serving to make the physical requirements of those tournaments more exacting and to distinguish those top-level competitions from other, less demanding competitions. *See* J.A. 258-60. And the "walking rule" is observed without exception in every other elite golf tournament throughout the world—from the Masters and United States Open in this country to the British Open and similar tournaments overseas. J.A. 164-67, 187-88, 192.

It is true, of course, that golf does not separately measure the act of walking the course: the only score recorded is the number of strokes taken from the teeing ground to the hole. But this fact does not mean that the task of shot-making and the task of walking during the competition are disconnected. *See* J.A. 65 (purpose of the walking rule is "to inject the element of fatigue *into the skill of shot-making*") (emphasis

added). To the contrary, the ability of each player to handle the physical demands of walking the golf course has a direct effect on his ability to execute shots with the needed power and precision. *See, e.g.*, J.A. 174-78 (testimony of Arnold Palmer); J.A. 189-91 (testimony of Jack Nicklaus). As the Seventh Circuit observed, the history of golf is filled with stories of players that managed to overcome physical exhaustion and discomfort in order to win important championships. *See Olinger*, 205 F.3d at 1006-07. The other, more anonymous side of the coin, however, is the experience of numerous tiring golfers who gradually fall by the wayside in the same events, unable to make the necessary shots in the final holes of the final round of a 72-hole tournament.

Even respondent has not challenged the "walking rule" directly, although he has questioned the need to apply it uniformly, pointing out that the Tour sponsors other tournaments in which players can either walk or use golf carts. Resp. Br. in Opp. 16-19. But these are two different points. There are no Tour-sponsored tournaments at which different players are subject to different substantive requirements or prohibitions. What respondent refers to are different events (such as tournaments involving senior golfers) where the Tour does not employ the "walking rule" and where each golfer can choose how to get around the course. All that demonstrates, of course, is that some golf tournaments can be played without a walking requirement, a fact that the Tour acknowledges.[26] The highest-level Tour events (the tournaments that respondent is suing about) are very different: those tournaments

[26] The fact that golf can be (indeed, usually is) played without a "walking rule" is no more relevant to the need for its uniform application at the highest levels of the sport than the fact that baseball can be (indeed, usually is) played with metal, rather than wooden, bats. Major-league baseball requires that all players use wooden bats, and it would "fundamentally alter" major-league baseball to allow some players, even if disabled, to play with metal bats instead.

invariably require, and have always required, that all golfers walk the golf course during the competition. *See* J.A. 64 ("[n]o waiver [of the "walking rule"] has ever been granted for individualized circumstances (such as disability)").

The second part of the Ninth Circuit inquiry—looking to whether the waiver of a substantive rule would give a disabled competitor an "unfair advantage" (J.A. 46)—is also insupportable. Leaving aside that this question should not be asked at all, *see* page 36 *supra*, there is, just as for the question of fundamental/non-fundamental rules, no reliable or consistent way to answer it. Any genuine comparison among individual athletes must take into account an almost infinite variety of physical attributes, ranging from height to strength to eyesight to coordination to stamina, and so on. Against this background of physical differences, the task of conducting an accurate hypothetical contest between one competitor and another, with each performing under different substantive rules, is too great for any fact-finder.[27] That is hardly surprising: much of what makes competitive sports so intriguing is that the ultimate results are, by nature, fluid and unpredictable. There is no sound way to anticipate or replicate those results in judicial proceedings.

The problem is well demonstrated in this case. While no one questions the effort shown by respondent, it is simply guesswork whether his use of a cart gives him an advantage over other competitors at a Tour event. It would be hard enough to find an answer to that question if all other golfers were the same (for example, the "able-bodied competitor" posited by the Ninth Circuit), but, in fact, different golfers react quite differently to the demands of walking a golf course

[27] Medical experts on both sides testified at trial that, because of physical differences and numerous other variables that affect fatigue, it is "impossible" to compare the levels of fatigue experienced by different individuals or to compare the relative effects of such fatigue. J.A. 193-94, 210-12.

during four or more rounds of a professional tournament. Even assuming that some fit, injury-free golfers might at times prefer to walk the course, other golfers at a Tour event suffer from severe physical conditions (bad backs, sore knees and ankles, arthritis, diabetes) that are made significantly worse by extensive walking. *See* J.A. 168-69. While these conditions are not necessarily "disabling," they prevent golfers from being able to play at all in particular tournaments and, at the very least, significantly increase the fatigue associated with walking the course. Many players affected by those conditions would thus find it easier to play Tour events with the benefit of a golf cart, as would golfers in poor physical condition. Does a player like respondent, who has a disability within the meaning of the Act but also a waiver from the "walking rule," have a competitive advantage over each of those players? In our view, it is impossible to know. Even if a fact-finder made a comparison with each golfer at each tournament on a case-by-case basis, there is no reason to be confident that the answers, whatever they were, would be correct.[28]

It would also impose a substantial burden on the Tour to conduct these comparisons. *See Olinger*, 205 F.3d at 1005-06. If the point is to determine whether the waiver of a rule for a particular competitor would give him an unfair advantage over each other competitor, the Tour would need to turn to a staff of medical specialists to determine the nature of the particular condition at issue and, presumably, the effect on performance of granting a waiver. It then would

[28] The courts below plainly stacked the deck by choosing a single point of comparison ("the able-bodied" golfer) for their evaluation of possible competitive advantage. For example, even if the term means only "non-disabled," this analysis ignores numerous golfers with injuries or other ailments who are unable to compete in certain tournaments at all but who might be able to with a cart. *See* J.A. 168-73. It is certainly arguable that respondent, who is able to compete in those tournaments with the benefit of a cart, has a distinct advantage over golfers in that situation.

have to evaluate the *relative* disadvantage suffered by all other golfers, each of whom has his own distinctive physical attributes. Even if this were feasible, which it is not, it would still be a poor substitute for what Tour competitions have always been: a test of physical ability under uniform rules.

We submit, therefore, that Title III is not fairly read to require professional sports organizations to change their substantive rules in order to accommodate disabled competitors. Although Title III does instruct operators of public accommodations to modify certain policies for the benefit of disabled persons, Congress was aware that the remedial goals of the Act would sometimes come into conflict with other important interests; in particular, it recognized that an otherwise reasonable modification might cause a fundamental change in the nature of a good or service. For those cases, Congress specifically set forth what should happen: by its express terms, the Act does not require the organization providing that good or service to "fundamentally alter the nature" of what it does. That principle is controlling here. It is essential to the nature of high-level Tour events that all competitors, without exception, play by the same substantive rules, and the Ninth Circuit failed to grant that interest its proper statutory weight.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

PGA TOUR, INC.,

Petitioner,

v.

CASEY MARTIN,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181 *et seq.*, (the "ADA") applies to the PGA Tour, Inc. ("PGA") when it operates golf courses, which the ADA expressly defines as places of public accommodation?

2. Whether the Court of Appeals properly affirmed as not clearly erroneous the district court's factual finding that the PGA did not demonstrate that providing a cart to Casey Martin — a disabled golfer who has all the skills to play professional golf but who cannot walk the golf course — fundamentally alters the nature of PGA competition?

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STATEMENT OF THE CASE

A. Casey Martin Has A Disability

Mr. Martin suffers from a congenital, degenerative circulatory condition called Klippel-Trenaunay-Weber Syndrome. The PGA concedes that Mr. Martin has a disability.[1] J.A. 35.

Despite his disability, Mr. Martin has proven his ability to compete with the top golfers in the world. Mr. Martin earned a scholarship to Stanford University where he was an NCAA academic All-American, and led his college golf team to the NCAA championship in 1994. Supplemental Excerpts of Record filed with the Court of Appeals for the Ninth Circuit ("S.E.R.") 74, 116-17. While at Stanford, Mr. Martin's condition "significantly worsened" until he could no longer walk the course, and Mr. Martin applied for and received permission to use a cart in collegiate competitions. J.A. 207; S.E.R. 75-77. Since graduating from Stanford, Mr. Martin has sought to compete on the PGA Tour. By virtue of a preliminary and permanent injunction issued by the district court (and affirmed by the Court of Appeals), Mr. Martin first qualified to play on the PGA's Nike Tour (now known as the Buy.com Tour, and hereinafter referred to as the "Nike Tour" as it was known during the trial in this case) in 1998 and 1999, and thereafter qualified to play on the PGA Tour in 2000.

It is undisputed that Mr. Martin "is at substantial risk of

1. Mr. Martin has lodged with the Court copies of a short videotape that illustrates the nature and extent of his disability. The district court noted that the videotape "provides compelling evidence of the nature and extent of his disability." Joint Appendix ("J.A.") 50. The condition, first diagnosed when Mr. Martin was three years old, is manifested in a massive, permanent malformation of his right leg that dramatically limits his ability to walk. Although blood can circulate into his lower right leg, blockage at knee level prevents recirculation, resulting in severe pain and atrophy of the lower leg. He is placed at "significant risk" of fracturing his tibia, hemorrhaging and developing deep blood clots "by the simple act of walking," and other routine life activities. The condition has progressively deteriorated and Mr. Martin's right leg is at risk of amputation above the knee. J.A. 35, 49-51, 198-200, 227.

serious physical harm by the mere act of walking." J.A. 51. Reviewing the record, the Court of Appeals observed:

> [Mr. Martin's condition] render[s] him unable to walk for extended periods of time. The mere act of walking subjects him to a significant risk of fracture or hemorrhaging. There is no dispute that Martin is profoundly disabled.

J.A. 35. As the district court found, "it is medically necessary for Casey Martin to be permitted a cart if he is to play the game of golf." J.A. 51.

B. The PGA Owns And Operates Golf Courses

The PGA is a lucrative commercial enterprise employing hundreds of persons and has annual revenues of over $300 million. *See* S.E.R. 276-77. The PGA does not dispute that it owns or operates certain golf courses on which its golf tournaments are played. J.A. 35.

"The purpose of PGA Tour is to protect the interests of professional golfers who qualify for membership in PGA Tour, to promote professional golf tournaments for PGA TOUR members, and to further the professional golf careers of PGA TOUR members." Defendant PGA Tour, Inc.'s Concise Statement of Material Facts, Dec. 24, 1997 ("PGA's Statement"), at ¶ 3. The PGA sponsors three separate tours for professional golfers: the PGA Tour, the Nike Tour and the Senior Tour (for qualifying golfers 50 years or older). J.A. 35, 74, 245. The regular PGA Tour consists of the best golfers in the game, and features approximately 200 players. J.A. 35, 74, 246. The Nike Tour is the next tier, consisting of approximately 170 players. J.A. 35, 74, 246. Any member of the public can qualify to become a member of the PGA Tour or otherwise qualify to play in a PGA Tour event based on performance in certain qualifying events. J.A. 161-63, 262-66; S.E.R. 284-89; transcript of trial proceedings ("Tr.") 836-37.

The principal way a player becomes a member of the PGA or Nike Tour is by demonstrating his ability in a three-stage tournament known as the PGA Tour Qualifying School

("Q School"). Any member of the public can play in the Q School if he pays a $3,000 entry fee and submits two letters of recommendation from members of the PGA Tour or the PGA of America. J.A. 40, 162-63; S.E.R. 284-89; Excerpts of Record filed with the Court of Appeals for the Ninth Circuit ("E.R.") 8. In 1997, approximately 1,200 players competed at Q School. J.A. 265. Competition in the first two stages winnows the field to 168 players, each of whom is guaranteed a place for the ensuing tournament year on either the PGA or Nike Tour. J.A. 265; S.E.R. 253, 284-89. Once a player qualifies to become a member of the PGA Tour, he must pay his own expenses to participate in each tournament he wishes to enter. *See* Tr. 814-16. The players in each tournament compete for prize money offered by the PGA Tour and individual tournament sponsors. Tr. 819-20. Players do not receive guaranteed prize money for playing in a tournament. Tr. 816.

C. The PGA Requires Walking As A Matter Of Discretion

The rules governing PGA and Nike Tour competition come from three sources: (1) the "Rules of Golf," as promulgated by the United States Golf Association ("USGA") and the Royal and Ancient Golf Club of St. Andrews, Scotland; (2) "Conditions of Competition and Local Rules," which golfers call the "Hard Card;" and (3) "Notices to Competitors," which relate to the particular golf course involved in a tournament. J.A. 62-63, 104, 127, 246-48. The Rules of Golf are the recognized fundamental rules of the game; as Judy Bell (the immediate past president of the USGA) testified, "[i]f you want to play golf, you need to play by these rules."[2] J.A. 239.

2. The PGA's and amicus curiae USGA's argument that the rules for professional golf competitions are different than the rules of golf generally (PGA Br. at 3; USGA Br. at 7-8) is contradicted by the statement of David Fay, the Executive Director of the USGA. During a recent interview, Mr. Fay stated, "We write the Rules of Golf – including equipment rules – to cover the game of golf. Some believe that our rules are written just for competitions. That is not the case. We make no distinction between competitive golf and so-called casual golf." (Cont'd)

The Rules of Golf make it clear that the essence of the game is shot-making:

> Rule 1. The Game. 1-1. General. The Game of Golf consists in playing a ball from the *teeing ground* into the hole by a *stroke* or successive strokes in accordance with the Rules.

J.A. 104 (emphasis in original). The Rules do not require players to walk. Indeed, nothing in the Rules defines walking as a fundamental part of the game. J.A. 63.

Rule 33-1 of the Rules of Golf authorizes the committee overseeing a tournament to set forth certain "optional conditions" enumerated in Appendix I to the Rules, *i.e.*, a Hard Card. J.A. 107, 239-40. The PGA promulgates a Hard Card annually containing the optional conditions applying to a year's competitions. J.A. 247. The Rules of Golf make clear that enumerated "optional conditions" do not affect the fundamentals of the game:

> Conditions should include such matters as method of entry, eligibility requirements, format, the method of deciding ties, the method of determining the draw for match play and handicap allowances. . . .

J.A. 126. The walking requirement is among the "optional conditions" relating to "transportation." J.A. 125; S.E.R. 159. Appendix I of the Rules of Golf prescribes specific language if a committee wishes to adopt a walking requirement as an optional condition:

> If it is desired to require players to walk in a competition, the following condition is suggested: *Players shall walk at all times during a stipulated round.*

J.A. 125 (emphasis added). Even though the Rules of Golf spell out how to require walking, the PGA chose not to adopt the

(Cont'd)
Interview with David Fay, Web Street Golf Report, Oct. 26, 2000, available at http://www.golfbiz.net (last visited Dec. 10, 2000) ("*Fay Interview*").

prescribed language. J.A. 127. Instead, it adopted a transportation rule that *specifically permits exceptions* for the use of carts. Thus, the PGA Tour Hard Card provides:

> Players shall walk at all times during a stipulated round *unless permitted to ride by the PGA TOUR Rules Committee.*

J.A. 127 (emphasis added) (The Nike Tour Hard Card has a substantially identical provision. J.A. 129). Ms. Bell acknowledged that the exception language added by the PGA "change[s] things, because you are talking about exceptions." J.A. 244. While the PGA seeks to portray walking as ingrained in the fundamentals of the game, it has not even adopted the optional walking requirement authorized by the Rules of Golf.

D. The PGA Does Not Enforce Its "Walking Rule" Uniformly

The PGA's so-called "walking rule" is riddled with exceptions.

1. The PGA Did Not Require Walking In Any Stage Of Q School Until 1997

The PGA has conducted Q School since 1965. As the Chairman of the Tour's Policy Board Richard Ferris testified, the purpose of Q School has always been to select "the best players" as members of the PGA Tour. S.E.R. 97; J.A. 266; *see also* J.A. 152 (the PGA's "philosophy has always been to conduct the Qualifying Tournament [Q School] in a manner that approximates a PGA TOUR event as closely as possible"). In implementing this philosophy of mirroring PGA Tour play at Q School, since 1965 the PGA has required Q School competitors to play under conditions comparable to PGA tournaments, *i.e.*, narrow fairways, high roughs, championship tees, fast greens and difficult pin placements. S.E.R. 91, 190-91. The Hard Card for PGA Tour events applies to all three stages of Q School. J.A. 267-68.

It was not until 1997 that the PGA required walking in the final stage of Q School. J.A. 216, 257-58. In 1997, PGA Commissioner Timothy Finchem proposed for the *first* time

that a walking requirement be imposed in the final stage of Q School. J.A. 152-54. The PGA Tour Policy Board (the equivalent of the PGA Board of Directors) approved the proposal as an optional condition of competition without any debate, without an expression by anyone that walking was fundamental to competitive golf, and without any suggestion that golfers using carts have an advantage over those who walk the course. *See* J.A. 152-54; S.E.R. 92-94. The PGA was never concerned about a perception during the three decades in which it allowed players to use carts in all three stages of Q School that players who rode gained a competitive advantage. S.E.R. 192. When the Commissioner was asked why riding was permitted in all three stages of Q School until 1997, he testified: "I wasn't commissioner." J.A. 258.

2. The PGA Continued To Permit Carts In The First Two Stages Of Q School

The PGA continued to allow golfers seeking to prove their ability to use carts in the first two stages of Q School until the appeal of this action. J.A. 162-63. Each of the 168 competitors that reaches the third stage is guaranteed a place on either the Nike or PGA Tour (J.A. 265; S.E.R. 253, 284-89), and thus until this very recent change could become a member of the "highest-level" tours without ever performing what the PGA terms a fundamental skill. The PGA did not require walking in the first two stages simply because of the economic and logistical difficulties in making caddies available for 1,200 competitors. J.A. 216-17. The PGA's Chairman testified that "[i]t was an economic decision" with no consideration about whether it fundamentally altered the competition. J.A. 220. By contrast, rules which affect shotmaking (such as the "one-ball rule") have been enforced at all stages of Q School. J.A. 267-68; Tr. 850.

3. The PGA Permits Carts In Other Qualifying Events

The PGA also does not require walking in the weekly "open" qualifying events conducted before each tournament which allow additional players the opportunity to compete in

the tournament. J.A. 262-64; Tr. 836-39. Every week golfers compete in these PGA qualifying events with carts, and the four lowest-scoring players receive an exempt entry into that week's tournament. J.A. 161, 262-64. These players do not have to prove walking ability to demonstrate their eligibility to compete in PGA Tour events. In 1986 at the Southern Open, Fred Wadsworth as an "open" qualifier, won a PGA tournament. S.E.R. 257.

4. The PGA Allows Carts During Its Events For Administrative Convenience

The PGA regularly permits competitors to ride when it suits the PGA's administrative convenience. For example, when a player cannot find his tee shot (or hits it out of bounds) during a PGA tournament, a PGA official will ride the player back to the tee in a cart after the player determines that his ball is lost or out of bounds. J.A. 201-02. Similarly, the PGA regularly rides tournament competitors when a long distance separates a green and the next tee, (J.A. 157-59; S.E.R. 58), and sometimes during play of an entire hole. J.A. 160.

5. The PGA Senior Tour Does Not Require Walking

The PGA permits players to use carts on the Senior Tour, which features 78 highly skilled golfers who are 50 years or older. J.A. 221-23. While the PGA has previously sought to minimize the competitiveness of the game on the Senior Tour by analogizing it to old-timers' day, for more than a decade the Senior Tour has offered highly competitive golf and lucrative earnings to its winners. J.A. 221-23; S.E.R. 111-13. Many Senior Tour golfers earn their living on the tour, and total available winnings exceed $40 million (contrasted with total winnings of $6.4 million on the Nike Tour). J.A. 224. In 1997, the leading money winner on the Senior Tour collected more money than Tiger Woods, the leading money winner on the same year's PGA Tour. *See* S.E.R. 56, 252.

The game played on the Senior Tour is the same game played on the PGA and Nike Tours (J.A. 224), and the same three sources of rules govern Senior Tour competition. J.A. 225.

The Chairman of the PGA Tour's Policy Board (which has ultimate authority over the Senior Tour) recognized that a linchpin to the PGA's position in this case — that one shot can separate first and second place in PGA Tour golf — is equally applicable to Senior Tour golf. J.A. 224. The Chairman also testified that carts are permitted at these competitive PGA golf events as "an economic matter, because if Arnold Palmer's got an arthritic hip and he can't walk 18 holes and we want Arnold Palmer out there playing because he's good for 5,000 more people to show up at the tournament," the walking requirement must yield. J.A. 218.

6. Other Examples Illustrate That Walking Is Not Fundamental

The NCAA And PAC-10 Have Accommodated Disabled Golfers. The Rules of Golf also govern the collegiate game. S.E.R. 42, 57. College golf is characterized by the same "very heavy competitive fire" as the PGA Tour, and many college courses are more difficult than Nike Tour courses. S.E.R. 42, 57. NCAA and PAC-10 rules not only require players to walk the course, but also carry their own bags and sometimes play 36 holes per day. S.E.R. 135. Nevertheless, the PAC-10's rules allow permanently disabled players to use carts upon approval by a majority of the coaches, and the NCAA's by-laws prohibit discriminatory practices. J.A. 155 (PAC-10 rules); S.E.R. 564 (NCAA by-laws); *see also* J.A. 207, 228. While at Stanford, Mr. Martin applied for and received permission to use a cart in collegiate competitions. J.A. 207, 228; S.E.R. 587. No one ever suggested that allowing Mr. Martin to use a cart altered the collegiate competition in any way. J.A. 208; S.E.R. 228-29.

Unlike Rules Addressing Shotmaking, Walking Does Not Affect A Golfer's Handicap. A handicap measures a golfer's skill level; the lower a golfer's handicap, the better the golfer. Tr. 428-29. A player's handicap is used to determine if he is eligible to compete in professional golf tournaments such as the U.S. Open. *See* J.A. 243; *Olinger v. United States Golf*

Ass'n, 205 F.3d 1001, 1002 (7th Cir. 2000), *petition for cert. filed* (Sept. 20, 2000) (No. 00-434). The PGA and the USGA do not consider whether a golfer used a cart in determining and recognizing his handicap. J.A. 229, 243.[3]

E. The PGA Refused Mr. Martin's Request To Use A Cart

Mr. Martin used a cart without objection in the first two stages of the 1997 Q School and qualified to enter the final stage. *See* J.A. 75. He requested permission from the PGA to use a cart in the final stage of Q School. In support of the request, he sent medical records to the PGA establishing his permanent disability, including a videotape showing the nature and extent of his condition. J.A. 232, 258-59; *see also supra* n.1.

The request and records were directed to the Commissioner, who never reviewed the medical records or contacted Mr. Martin's doctor. J.A. 232, 258-59. Nor did he consult with any experts concerning Mr. Martin's medical condition or determine whether use of a cart by Mr. Martin would fundamentally alter the nature of PGA competition. J.A. 232, 258-59. He did not even consider waiving the Hard Card's walking rule as is permitted under the PGA's own rules. And he decided not to consult the Rules Committee or the Tournament Director to see if they would exercise their authority to grant Mr. Martin an exception to the walking rule. J.A. 232, 258-59.

3. The PGA and USGA's indifference to whether an individual walked in determining his or her handicap contrasts with their vigilance in enforcing rules affecting shotmaking. Recently, Callaway (a golf club manufacturer) introduced a new driver. The USGA tested the club, and rejected its use. According to USGA spokesman Marty Parke, if a golfer uses the new driver in a round of golf, "[y]ou are not able to post that score [for handicap purposes] because it was not shot under the rules of golf." Ron Sirak, *Callaway's big bang*, GolfDigest.com, Oct. 27, 2000, available at http://www.golfworld.com (last visited Dec. 10, 2000). Executive Director of the USGA David Fay further stated, "if a player wishes to submit – from a golf course located in the United States – a score for golf-handicap purposes, that score can not be submitted if the player is using golf clubs and/or a ball which does not conform to the USGA Rules of Golf." *Fay Interview*.

Without making any objective determination that allowing Mr. Martin to use a cart would give him a competitive advantage, the Commissioner rejected Mr. Martin's request and returned the medical records to Mr. Martin without reviewing them. J.A. 51-52, 218, 232; S.E.R. 201-02.

F. The District Court Proceedings

Mr. Martin commenced this action in the United States District Court for the District of Oregon seeking preliminary and permanent injunctive relief under Title I and Title III of the ADA requiring the PGA to permit him to use a cart in the third stage of Q School and in subsequent PGA events for which he qualified. The district court granted the preliminary injunction, and Mr. Martin played well enough to earn a spot on the 1998 Nike Tour.

By Order dated January 30, 1998, the district court granted summary judgment against the PGA on two issues. The district court held on the basis of an undisputed factual record that (1) the PGA is not exempt from the ADA as a private club because it is a commercial enterprise, and (2) the PGA owns, operates and leases places of public accommodation, subjecting it to Title III of the ADA. *See* J.A. 84, 88.

The district court thereafter conducted a six-day bench trial in which it received medical and lay testimony principally relating to whether Mr. Martin's use of a cart to enable him to participate in PGA competition would fundamentally alter the nature of PGA competition. On February 19, 1998, the District Court issued its Findings of Fact and Conclusions of Law containing detailed factual findings supporting the conclusion that there is "compelling evidence that even the PGA Tour does not consider walking to be a significant contributor to the skill of shot-making," and that under the individual inquiry mandated under the ADA, the PGA had failed to meet its burden that permitting Mr. Martin to use a cart would fundamentally alter PGA competitions. J.A. 61, 67-69. The court stated:

> Every individual differs in their psychological fatigue components, but walking has little to do with such components. If anything, from the evidence introduced at trial, most PGA Tour golfers appear to prefer walking as a way of dealing with the psychological factors of fatigue. . . . Walking for Casey Martin is a different story. . . . As plaintiff easily endures greater fatigue even with a cart than his able-bodied competitors do by walking, it does not fundamentally alter the nature of the PGA Tour's game to accommodate him with a cart.

J.A. 61, 67-69.[4]

G. The Court Of Appeals Upheld The District Court's Findings

By Order dated March 6, 2000, the Ninth Circuit Court of Appeals affirmed the district court's rulings. The court held that the factual record developed in the district court supported the conclusion that "[t]he central competition in shot-making would be unaffected by Martin's accommodation. All that the cart does is permit Martin access to a type of competition in which he otherwise could not engage because of his disability. That is precisely the purpose of the ADA." J.A. 43-44.

The Court of Appeals applied unambiguous statutory language in a straightforward manner. Addressing whether Title III applies to the PGA when it sponsors golf tournaments, the Court of Appeals observed that Congress expressly included golf courses among the list of places of public accommodation. J.A. 37. Rejecting the PGA's construct that places of public accommodation can be bifurcated into public and private zones, the Court of Appeals noted that "Title III does not restrict its coverage to members of the public; it provides that '[n]o individual shall be discriminated against' in the enjoyment of public accommodations by reason of disability." J.A. 40 n.7. The Court of Appeals identified the flaw in the PGA's bifurcation argument: "[T]hat users of a facility are highly selected does not mean that the facility cannot be a public accommodation." J.A. 40.

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4. The district court also ruled that Mr. Martin was not an employee of the PGA, and therefore could only receive protection under Title III. J.A. 58.

The Court of Appeals also affirmed as "not clearly erroneous" (J.A. 43) the district court's findings of fact made after a six-day bench trial under the individualized inquiry mandated under the ADA. "In light of these findings," the Court of Appeals concluded "as did the district court, that permitting Martin to use a cart in PGA and Nike Tour competitions would not fundamentally alter the nature of those competitions." J.A. 43.

SUMMARY OF ARGUMENT

This case involves a decision of the Court of Appeals interpreting Title III of the ADA in accordance with the plain language of the statute and its legislative history. Casey Martin is seriously disabled as a result of a debilitating circulatory condition. At the same time, Mr. Martin is a highly talented golfer, able to match skills with the best in the game. The PGA has tried to deny Mr. Martin access to the game of golf at its highest levels because he cannot walk the course. Mr. Martin requested a cart to enable him to play, and the PGA refused. In enacting the ADA, Congress recognized that unequal treatment of people with disabilities cannot be overcome unless both intentional and unintentional barriers to full participation in all aspects of life are eradicated. The Court of Appeals' decision simply enforced on an undisputed record unambiguous language in Title III of the ADA establishing that golf courses owned and operated by the PGA are places of public accommodation. Consistent with the individualized inquiry endorsed by this Court, the Court of Appeals also held that the ADA *requires* the PGA to accommodate Mr. Martin's disability unless it proves that use of a cart would fundamentally alter the nature of its competitions by giving *Mr. Martin* (as opposed to a hypothetical able-bodied golfer) a competitive advantage.

No case has ever held that a commercial enterprise which "is part of the entertainment industry" (J.A. 79) may insulate itself from federal anti-discrimination laws by creating artificial areas of exclusion. Title III of the ADA broadly prohibits discrimination on the basis of a disability against any

"individual" seeking the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). Title III expressly defines a "public accommodation" as including a golf course. *See* 42 U.S.C. § 12181(7)(L). Mr. Martin is a disabled individual seeking the opportunity to play in PGA sponsored competitions taking place on golf courses. The clear and unambiguous language of Title III protects Mr. Martin from the PGA's discriminatory decision to deny him access to its competitions.

The PGA concedes that the ADA applies to spectators at its golf courses, but argues that Congress intended the ADA to extend only up to the ropes separating performers from spectators. The ADA provides no statutory basis to bifurcate a place of public accommodation into covered and uncovered zones. In *Daniel v. Paul*, 395 U.S. 298 (1969), this Court expressly rejected a similar argument under the analogous provision of Title II of the Civil Rights Act. *Id.* at 305-08. The lower courts have uniformly found that performance spaces are covered by Title III of the ADA.[5] The Department of Justice (the administrative agency charged with implementing the ADA) agrees. Both the implementing regulations and the legislative history support the same conclusion. Accordingly, the PGA proposes an unprecedented exception to the ADA that conflicts with the statutory language and interpretive authority.

The PGA fares no better with its newly-minted arguments that Title III applies only to "clients and customers" and that Mr. Martin is making a "workplace" claim foreclosed under Title III. First, the PGA waived these arguments by not raising

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5. *See, e.g., Jones v. United States Golf Ass'n*, Civ. No. A-00-CA-278 JN, slip op. at 5-6 (W.D. Tex. Aug. 30, 2000); *Olinger v. United States Golf Ass'n*, 55 F. Supp. 2d 926, 933 (N.D. Ind. 1999) ("[T]he USGA's contention that it alone may set the rules is simply another version of its argument that the USGA is exempt from the provisions of the ADA, '[a]nd it is not.'") (quoting *Martin* district court opinion), *aff'd on other grounds*, 205 F.3d 1001 (7th Cir. 2000), *petition for cert. filed* (Sept. 20, 2000) (No. 00-434).

them in the lower courts. *See Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998). On the merits, Section 12182 of the ADA prohibits discrimination against all "individuals." The PGA's attempt to engraft a "client or customer" limitation — borrowed from a subsequent and narrower provision of Title III — onto unambiguous coverage for "individuals" collides with basic statutory construction. The legislative history also confirms that the "client or customer" language is confined to sub-provisions not implicated here, and the only court to address this argument has flatly rejected it. *See Menkowitz v. Pottstown Mem'l Med. Ctr.*, 154 F.3d 113, 121 (3d Cir. 1998). Finally, even if this Court were to accept the PGA's "client or customer" limitation on Title III, Mr. Martin still qualifies for Title III protection as a consumer of the PGA's goods, services, facilities, privileges, advantages or accommodations.

The PGA's contention that Title III will engulf Title I if Mr. Martin prevails misapprehends the two titles. The Court of Appeals did not purport to address Title I, which governs "employee" claims; Title III applies to public accommodations. This case does not present the issue of whether an employee can obtain protection under Title III because the Court of Appeals did not disturb the district court's conclusion that Mr. Martin is not an employee. J.A. 48 n.10. Title III applies to claims by "individuals" seeking access to places of public accommodation. Mr. Martin clearly fits within this category and is therefore entitled to protection under Title III. That Mr. Martin might earn compensation at PGA tournaments by winning prize money does not change the analysis. Simply put, Title III does not withhold protection from "individuals" who may earn money at places of public accommodation but are not employees.

At bottom the PGA seeks a license to discriminate. Accepting the PGA's argument that Title III does not apply to it would grant it free rein to discriminate "inside the ropes" not only on the basis of any disability, but on the basis of race or

religion. The PGA's counsel acknowledged this before the district court. J.A. 197. The Court of Appeals foreclosed this result by applying Title III according to its terms.

The PGA next argues that there can be no modification of its walking requirement for Mr. Martin, contending that it has adopted a facially neutral rule which requires all players to walk. The PGA asserts that each and every rule of PGA Tour competition it deems "substantive" is "fundamental," and a change in any rule could hypothetically confer a competitive advantage. Through this argument the PGA would effectively elevate professional sports beyond the reach of Congress, no matter how great a barrier to participation a given rule poses, no matter how insignificant the rule to the competition, and no matter how reasonable the modification requested. The Court of Appeals identified the flaw in this argument: "The mere fact that PGA has defined walking to be part of the competition cannot preclude inquiry, or PGA will have been able to define itself out of the reach of the ADA." J.A. 45.

Under Title III of the ADA, the PGA was required to honor Mr. Martin's request unless it could prove that allowing him to use a cart would "fundamentally alter" the nature of its "goods, services, facilities, privileges, advantages, or accommodations." 42 U.S.C. § 12182(b)(2)(A)(ii). The fundamental alteration analysis turns on an inquiry into the facts of Mr. Martin's disability and the effect of his requested modification on the PGA competitions. The Court of Appeals' "intensively fact-based" holding (J.A. 45) was expressly based on detailed factual findings made in the district court following a six-day bench trial supporting the conclusion that permitting Mr. Martin to use a golf cart would not fundamentally alter the nature of PGA and Nike Tour golf. As the Court of Appeals stated, the issue of "whether the accommodation of permitting Martin to use a golf cart fundamentally alters the PGA and Nike Tour competitions . . . was fully tried in the district court," and the district court's findings were affirmed under the appropriate

clearly erroneous standard. J.A. 43. Those findings demonstrated that "[a]ll that the cart does is permit Martin access to a type of competition in which he otherwise could not engage because of his disability." J.A. 44. In addition, the Court of Appeals correctly concluded that the PGA could not meet its burden because the evidence showed that the PGA's own walking requirement is riddled with exceptions which permit the use of carts, and there is no Rule of Golf which prohibits accommodations for people with permanent disabilities who cannot walk the course. J.A. 42. The PGA does not contest the factual underpinnings of the district court's findings.

Mr. Martin is not asking for a wider golf hole, or a few strokes in "handicap." He is not asking to change the rules of the game; he is asking only to be allowed to *get to the game*, which is exactly what the ADA requires. The ADA requires that all organizations subject to the ADA modify their rules to permit full participation by people with disabilities. To argue that in sport the rules themselves are what is fundamental to the enterprise is to try to define sport as exempt from the ADA — and to do so in an insidious way. If no rule of competition, regardless of its purpose, can be modified to permit participation by people with disabilities, then — ironically — sport becomes the only industry in America permitted to construct barriers to access that are unrelated to performance.

ARGUMENT

I. THE PGA OPERATES A "PLACE OF PUBLIC ACCOMMODATION" AND THEREFORE IS SUBJECT TO TITLE III OF THE ADA

A. Golf Courses Are Places Of Public Accommodation

The ADA is the most extensive civil rights legislation enacted by Congress since the Civil Rights Act of 1964, and it embodies "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Congress enacted the ADA in 1990 after 20 years of experience with six other disability discrimination statutes demonstrated that a

comprehensive federal remedy was necessary. *See* H.R. Rep. No. 101-485, pt. 2, at 47-48 (1990). As Congress recognized, "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous. . . ." 42 U.S.C. § 12101(a)(9). Accordingly, Congress enacted the ADA as a direct and sweeping federal response, forbidding disability discrimination in all aspects of society.

The threshold inquiry here is whether the PGA is subject to the ADA when operating golf courses for its tournaments. Section 12181 of Title III sets forth the operative definitions for the title. 42 U.S.C. § 12181. Section 12182 enacts the "Prohibition of discrimination by public accommodations." 42 U.S.C. § 12182. Section 12182(a) sets forth the general rule against discrimination:

> (a) General rule — No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). Casey Martin is an individual who claims that the PGA has sought to discriminate against him on the basis of his undisputed disability in the full and equal enjoyment of the "goods, services, facilities, privileges, advantages or accommodations" offered at the golf courses on which the PGA sponsors tournaments.

In Section 12181, Congress expressly defined "public accommodation" to include a "golf course." 42 U.S.C. § 12181. The statute provides:

> § 12181. Definitions — As used in this subchapter:
>
> * * *

> (7) Public accommodation. — The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce —
>
> * * *
>
> (L) a gymnasium, health spa, bowling alley, *golf course*, or other place of exercise or recreation.

42 U.S.C. § 12181(7)(L) (emphasis added). This language makes it crystal clear that when the PGA owns, leases or operates a golf course, it is subject to the strictures of the ADA. There is no exception in the statute for use of places of public accommodation at specific events, such as competitions or tournaments.

Section 12181(7)(C) also identifies as a "public accommodation" a "motion picture house, theater, concert hall, stadium, *or other place of public exhibition or entertainment*," and Section 12181(7)(D) extends the definition to "an auditorium, convention center, lecture hall, or other place of public gathering." 42 U.S.C. § 12181(7)(C), (D) (emphasis added). Thus, in addition to specifically defining golf courses as public accommodations, Congress broadly designated as a public accommodation any place where the public gathers, which certainly would include the tournaments the PGA offers for public exhibition.

As this Court recently and unanimously stated, "unambiguous statutory text" in the ADA must be enforced as written. *See Yeskey*, 524 U.S. at 212. This Court held that the unambiguous language of Title II of the ADA plainly includes prisons within the Act's coverage because "[s]tate prisons fall squarely within the statutory definition of 'public entity.'" *Id.* at 210. This Court concluded that there was no textual basis for distinguishing between the "many recreational 'activities,' medical 'services,' and educational and vocational 'programs'" provided by prisons that "theoretically 'benefit' . . . prisoners," and the programs, services, and activities provided by other public entities. *Id.*

The analysis here is the same. Title III of the ADA applies to "golf courses" without qualification. Moreover, the numerous definitions of "public accommodations" capture the golf courses used during PGA competitions under a variety of labels, whether they are considered places of exercise, recreation, exhibition or public gathering. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) ("Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.'") (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

Confronted with this unambiguous language, the PGA concedes that the golf courses it operates during tournaments are "public accommodations" for spectators, but would draw a line to permit discrimination "inside the ropes" where the golfers play. The flaws in this artificial divide are manifold. First, no statutory basis exists to compartmentalize a place of public accommodation into covered and uncovered territory. The statute covers facilities in their entirety — "golf courses," "stadiums," "auditoriums." It would contravene the plain language of Title III to allow operators of these public spaces to arbitrarily draw lines between where they will and won't abide by the ADA.[6]

Amicus curiae USGA turns the statute on its head to argue that Congress' inclusion of the scope-*extending* phrase "or other place of exercise or recreation" after the enumeration of golf courses as places of public accommodation should limit the common meaning of "golf course." USGA Br. at 11. The legislative history indicates that by incorporating a catch-all

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6. The examples of "mixed use" facilities cited by the USGA (USGA Br. at 12-14) are inapposite. With respect to the example of the residential apartment wing of a hotel, the wing is not covered because Congress specifically exempted it from coverage under the Act. *See* 42 U.S.C. § 12181(2)(A). Congress made no such exemptions for different parts of golf courses.

component into the definition, Congress intended the enumerated examples to be construed broadly.[7]

The Justice Department's regulations implementing the ADA — which "are entitled to deference" — reinforce the conclusion that Congress intended to address a wide variety of places, and not to limit the applicability of Title III to particular uses within those places.[8] The regulations provide that "[a] facility . . . is a place of public accommodation for purposes of the ADA to the extent that its operations include those types of activities engaged in . . . by the facilities [listed] in section [12181](7)." 28 C.F.R. ch. 1, pt. 36, App. B., § 36.104. Clearly,

7. Consistent with the broad scope of public accommodations, Senate Report 116 stated that "the legislation only lists a few examples and then, in most cases, adds the phrase 'other similar' entities." S. Rep. No. 101-116, pt. 1, at 59 (1989); *see also* H.R. Rep. No. 101-485, pt. 2, at 100 (1990). It was intended "that the 'other similar' terminology should be construed liberally." *Id.*; *see Bragdon v. Abbott*, 524 U.S. 624, 639 (1998) (recognizing that the list of "major life activities" under the ADA "is illustrative, not exhaustive"). The legislative history states:

> [T]he legislation lists "golf course" as an example under the category of "place of exercise or recreation." This does not mean that only driving ranges constitute "other similar establishments." Tennis courts, basketball courts, dance halls, playgrounds, and aerobics facilities, to name a few other entities are also included in this category. Other entities covered under this category include video arcades, swimming pools, beaches, camping areas, fishing and boating facilities, and amusement parks.

S. Rep. No. 101-116, pt. 1, at 59 (1989); H.R. Rep. No. 101-485, pt. 2, at 100 (1990).

8. *See Olmstead v. Zimring*, 527 U.S. 581, 597-98 (1999) ("Because [the Justice Department] is the agency directed by Congress to issue regulations implementing Title II, . . . its views warrant respect."); *Bragdon*, 524 U.S. at 642, 646 ("[T]he Department's views are entitled to deference" and provide guidance regarding construction of the ADA.). The Justice Department has submitted an amicus curiae brief supporting Mr. Martin's position and providing its unequivocal view that the competition area of golf courses operated by the PGA during tournaments are places of public accommodation.

golf competition is the exact activity contemplated in Section 12181(7). The regulations add that the term "place of public accommodation" under Title III "is *quite extensive* and . . . [applies] even if the operation is only for a short time." 28 C.F.R. ch. 1, pt. 36, App. B, § 36.201 (emphasis added). These indications of the breadth of Title III directly contradict the PGA's effort to circumscribe and limit the amount of space that qualifies as a "public accommodation."

Historical support for the Justice Department's views is found in its Standards for Accessible Design applying Title III to many areas designated for performers. The Standards pertain to areas of "Public Use" — the "rooms or spaces" made accessible to the "general public" — *and* areas of "Common Use," which refer to:

> [T]hose . . . spaces, or elements that are made available for the use of a *restricted group of people* (for example, occupants of a homeless shelter, the occupants of an office building, or the guests of such occupants).

28 C.F.R. ch. 1, pt. 36, App. A, § 3.5 (emphasis added); *see also id.* § 4.1.3(5)(a), (c) (ADA applies to "performing areas," where general public is not allowed during performances). In a policy statement promulgating ADA requirements for the construction of new sports stadiums, the Justice Department requires construction of accessible routes that "connect the wheelchair seating locations with the stage(s), performing areas, arena or stadium floor, dressing or locker rooms, *and other spaces used by performers*." U.S. Dep't of Justice, Civil Rights Div., Disability Rights Section, *Accessible Stadiums*, available at http://www.usdoj.gov/crt/ada/stadium.pdf (last visited Dec. 10, 2000) (emphasis added).[9]

9. In 1996, the United States resolved an ADA dispute with the Atlanta Committee for the Olympic Games by requiring accessibility for the public seating, dugouts, locker rooms, and dressing rooms. *See Settlement Agreement Concerning the Olympic Stadium, available at* http://www.usdoj.gov/crt/ada/stadiumo.htm (last visited Dec. 10, 2000).

Thus, the PGA's argument that players step outside the protections of the ADA when they take the field is meritless.

This Court's interpretation of analogous civil rights statutes is also instructive.[10] While none of the eight ADA cases decided by this Court addressed the specific question of defining "public accommodations" for purposes of Title III, the Court has decided a closely analogous issue under Title II of the Civil Rights Act of 1964. *See Daniel*, 395 U.S. at 302. In *Daniel*, this Court held that because the snack bar of a recreational entertainment facility was covered, the entire facility was a public accommodation under Title II. *Id.* at 305. Because Congress intended the ADA to expand significantly the public accommodations covered under the Civil Rights Act (limited to lodging, eating, and entertainment), *a fortiori* Congress intended to include golf courses without limitation. *See* Jonathan M. Young, National Council On Disability, *Equality of Opportunity — The Making of the Americans with Disabilities Act* 101-02 (1997).

More significantly, this Court in *Daniel* flatly rejected the argument that the term "place of entertainment" refers "only to establishments where patrons are entertained as spectators or listeners rather than those where entertainment takes the form of direct participation in some sport or activity." *Daniel*, 395 U.S. at 306-08. Although much of the Civil Rights Act's legislative history "focused on places of spectator entertainment," this Court held "it does not follow that the scope of [the public accommodation provision under Title II] should

10. *See, e.g., Olmstead*, 527 U.S. at 599 (looking to the statutes that preceded the ADA in concluding that it "stepped up earlier measures to secure opportunities" for disabled persons); *id.* at 616-19 (Thomas, J., dissenting) (looking to Title VII and the Rehabilitation Act in construing the definition of discrimination under the ADA); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 505-06 (1999) (Stevens, J., dissenting) (looking at Title VII in construing the scope of the ADA's coverage); *Bragdon*, 524 U.S. at 631 (looking to the Rehabilitation Act and the Fair Housing Amendments Act in construing the definition of disability under the ADA).

be restricted to the primary objects of Congress' concern *when a natural reading of its language would call for broader coverage*," particularly in light of the broad remedial purpose of the Act. *Id.* at 307-08 (emphasis added).

The Court of Appeals correctly observed that "the greatest difficulty with PGA's argument" that it can discriminate at allegedly "private spaces" on golf courses (PGA Br. at 22) is the assumption — contradicted by the record — that "there is nothing public about the competition itself." J.A. 40. Competitors in PGA events are very much members of the public. The Q School through which most members of the Nike and PGA Tours qualify is hardly selective. "Any member of the public who pays a $3000 entry fee and supplies two letters of recommendation may try out in" Q School. J.A. 40, 162-63; S.E.R. 284-89; E.R. 8. The PGA's Executive Vice President testified he is unaware of any Q School applicant ever turned away. J.A. 184. As the PGA's Chairman testified, "there are a lot of people that have the Walter Middy [sic] dream, and they are willing to pay the [fee] just for the fun of going and trying." J.A. 220. As the Court of Appeals noted, there is "no justification in reason or in the statute to draw a line beyond which the performance of athletes becomes so excellent that a competition restricted to their level deprives its situs of the character of a public accommodation." J.A. 41.[11] Many places of public accommodation have selective admission criteria. But it does not follow that people satisfying the criteria thereby forfeit the protections of anti-discrimination laws. As the Court of Appeals noted, even though only a small percentage of students are admitted to the nation's top law schools, it is undisputed that

11. The foundation of the bifurcation argument — that only competitors are permitted on the field of play during competition — is also factually flawed. It is undisputed that scores of individuals who are not PGA members, including caddies, tour personnel and reporters, are permitted "inside the ropes" during PGA competition. J.A. 38.

Title III of the ADA applies to those institutions.[12] *See* J.A. 40; 42 U.S.C. § 12181(7)(J); *Rothman v. Emory Univ.*, 828 F. Supp. 537, 541 (N.D. Ill. 1993).

Recently, the United States District Court for the Western District of Texas addressed the same question presented here and roundly rejected the USGA's bifurcation argument. *See Jones*, Civ. No. A-00-CA-278 JN, slip op. at 5-6.[13] The court noted that the plain language of the statute identified golf courses as places of public accommodation, and "there is no basis for finding . . . that a place defined as a public accommodation can have certain exempt zones carved from it." *Id.* at 4-6.

The PGA's view would forfeit the protections of anti-discrimination laws for a host of individuals who currently enjoy full and equal access to public accommodations. For example, an "auditorium," a "museum" and a "private school" are places of public accommodation, *see* 42 U.S.C. § 12181(7)(D), (H), (J), and do not cease to be for individuals with disabilities who need an accommodation to access the facilities to audition or perform. The PGA posits that members of the public attending an opera or symphony are protected, but individuals such as

12. The PGA unfairly asserts that the Court of Appeals should have compared Mr. Martin to a teacher at a private school rather than to a student. PGA Br. at 23. Because the PGA did not even raise below the issue that Title III somehow encroaches on Title I, the Court of Appeals had no occasion to consider any possible difference between a teacher and a student at a private school. The Court of Appeals' analogy to a talented student at a private institution was an apt response to the PGA's argument below that Title III did not apply to Mr. Martin because the PGA is highly selective.

13. The Court of Appeals' interpretation of Title III is also consistent with the only other case involving application of Title III to a professional golf association — *Olinger*. In holding that the USGA is subject to Title III of the ADA, the *Olinger* district court (the Seventh Circuit did not resolve the issue) expressly stated that it was joining the *Martin* district court decision. *Olinger*, 55 F. Supp. 2d at 932-33. Thus, *every case to decide whether Title III applies to a professional golf association has held that it applies.*

blind tenor Andrea Bocelli and violinist Itzhak Perlman (who has a crippling disability) — both of whom excel in their professions — can be discriminated against on the basis of disability at auditions or performances because they need accommodations to access the performance area. Similarly, the PGA would withhold anti-discrimination protection from an individual with a disability who wants to try out or perform at a theater or recital, or seeks to earn compensation at a talent show, even though Title III unambiguously applies to all places of "exhibition or entertainment." *See* 42 U.S.C. § 12181(7)(C).

Congress extended the protections of Title III to all "individuals" at "places" of "public accommodation," without limiting their purpose for being there or the uses being made of the facility. During the legislative process, Congress took note of then-Attorney General Thornburgh's testimony "that we must bring Americans with disabilities into the mainstream of society 'in other words, *full participation* in and access to all aspects of society.'" H.R. Rep. No. 101-485, pt. 2, at 35 (1990) (emphasis added) (quoting Congressional testimony of the then-Attorney General). In the ADA Congress also responded to testimony that identified discrimination in "the failure to make reasonable modifications in policies to allow *participation*" by people with disabilities, *id.* at 36 (emphasis added), and observed that "it can constitute a violation [of Title III] to impose criteria that limit the *participation* of people with disabilities," *id.* at 105 (emphasis added).

B. The PGA's Proposed "Clients Or Customers" Limitation On All Of Title III Is Meritless

1. PGA Waived Its "Clients Or Customers" Argument By Not Raising It Below

The PGA next formulates an argument that was not presented to and therefore not addressed by the courts below. Engrafting a sharply limited standing requirement onto Section 12182(a)'s general prohibition against discrimination, the PGA asserts that the only individuals who are protected by Title III are "clients or customers" of the public accommodation. The

phrase "clients or customers" never even appears in the PGA's Court of Appeals briefs. The PGA's failure to raise this argument in the district court or the Court of Appeals precludes its assertion here. *See Yeskey*, 524 U.S. at 212-13 (refusing to rule on constitutional argument in ADA case, noting that "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them"); *see also Bragdon*, 524 U.S. at 658 n.1 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) ("[W]e have rarely addressed arguments not asserted below.").

2. Section 12182(a) Of Title III Plainly Applies To "Individuals"

Putting aside that the PGA's "client or customer" argument is not properly before the Court, the argument makes up in creativity what it lacks in textual support. Section 12182(a) of Title III prohibits discrimination against an "individual." 42 U.S.C. § 12182(a). By misinterpreting a subpart of Section *12182(b)* — which on its face does not apply to all of Section 12182(a) — the PGA seeks to recast Congress' unambiguous intention to protect "individuals" as protecting a narrower segment of the population, individuals who are "clients or customers" of a public accommodation.

Section 12182(b), termed "Construction," contains part (1) "General prohibition" and part (2) "Specific prohibitions." 42 U.S.C. § 12182(b)(1), (2). Casey Martin's request is governed by part (2)'s subsection dealing with reasonable modifications. The relevant text provides:

> (2) Specific prohibitions
>
> (A) Discrimination – For purposes of subsection (a) of this section, discrimination includes —
>
> * * *
>
> (ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.

42 U.S.C. § 12182(b)(2)(A)(ii). Congress did not limit the type of "individual" protected or the status of a purported plaintiff. This Court's observation in *Bragdon* that "[t]he breadth of the term confounds the attempt to limit its construction in this manner" is equally applicable here. 524 U.S. at 638. The statute's plain language defeats the PGA's proposed revision of the statute — adopted by no authority — that an "individual" suing under Section 12182(a)'s "General rule" and Section 12182(b)(2)(A)(ii)'s "reasonable modification" requirement be a "client or customer."

The PGA borrows this purported limitation from a completely different part of Section 12182(b). In subparagraph 12182(b)(1)(A), the statute addresses a "General prohibition" related to "Activities." 42 U.S.C. § 12182(b)(1)(A). In three clauses, the statute provides that entities shall not subject "an individual or class of individuals" to (i) denial of participation, (ii) participation in an unequal benefit, or (iii) separate benefits. 42 U.S.C. § 12182(b)(1)(A)(i)-(iii). A fourth clause clarifies that *for these three clauses only*, the term "individual or class of individuals" refers to "clients or customers:"

> (iv) Individuals or class of individuals – *For purposes of clauses (i) through (iii)* of this subparagraph, the term "individual or class of individuals" refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.

42 U.S.C. § 12182(b)(1)(A)(iv) (emphasis added).

The legislative history explains that the limitation was prompted by Congress' recognition that subparagraph 12182(b)(1)(A) (not relied on by Mr. Martin or the Court of Appeals) is virtually limitless in terms of covered entities,

reaching any person or organization who "directly, or through contractual, licensing, or other arrangements" causes a disabled person or class of individuals to be subjected to specified discriminatory treatment. 42 U.S.C. § 12182(b)(1)(A). Congress was concerned about the potentially far-reaching scope of contractual liability and therefore included a limitation on complainants entitled to sue. Clause (iv) clarifies that a contracting entity will not be liable "for discrimination that may be practiced by those with whom it has a contractual relationship, when that discrimination is not directed against its own clients or customers." H.R. Rep. No. 101-485, pt. 2, at 101 (1990). This provision simply specifies the extent of liability for contractual relations; it does not sweepingly limit Title III.

This conclusion is reinforced by Congress' decision *not* to include a "client or customer" limitation on what it denominated the "General rule." *See* 42 U.S.C. § 12182(a). Nor did it place such a limitation in the general definitions in Section 12181. 42 U.S.C. § 12181. The only "client or customer" limitation is in Section 12182(b), and that limitation is expressly confined to a subparagraph 12182(b)(1)(A) not at issue here. 42 U.S.C. § 12182(b)(1)(A). The PGA's attempt to overlay an expressly limited sub-definition onto the general anti-discrimination provision (Section 12182(a)) and the specific prohibitions contained in Section 12182(b)(2) collides with bedrock principles of statutory interpretation. Where Congress has expressly limited the applicability of a statutory provision, this Court will not expand the applicability of that provision to other sections. *See Bates v. United States*, 522 U.S. 23, 29-30 (1997) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation omitted)); *United States v. Naftalin*, 441 U.S. 768, 773 (1979) ("Respondent nonetheless urges that the phrase 'upon the purchaser,' found only in subsection (3) of § 17(a), should be read into all three subsections. The short answer is

that Congress did not write the statute that way."); *see also Olmstead*, 527 U.S. at 622 (Thomas, J., dissenting) (citing *Bates* in comparing the definitions of discrimination under Titles I and II of the ADA).

Although the plain language of the statute is sufficient to defeat the PGA's argument, the legislative history buttresses the conclusion. The drafting reports indicate that Congress initially considered defining "public accommodation" generally as "privately operated establishments . . . that are used by the general public as customers, clients, or visitors." S. 933, 101st Cong. § 401(2)(A)(i)(I) (1989); H.R. 2273, 101st Cong. § 401(2)(A)(i)(I) (1989). The decision by Congress to enact in Section 12181 a broader definition that does not refer to "customers or clients" indicates a conscious decision not to limit the status of potential plaintiffs in the manner proposed by the PGA.

3. Applying Title III To "Individuals" Does Not Encroach On Title I

The PGA's contention that the Court of Appeals' straightforward application of Title III has worked mischief on the interplay between Title III and Title I's employment provisions is an extended detour around unambiguous statutory language. Title III grants equal access and enjoyment of different and often broader areas than Title I's employment-related provisions: Title III grants to "individuals" full and equal access to the "goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a).

The PGA's assertion that the Court of Appeals has radically expanded the scope of the employment provisions of Title I is puzzling; the Court of Appeals did not purport to address Title I. This case does not present the issue of whether an employee can obtain protection under Title III because the Court of Appeals did not disturb the district court's conclusion that Mr. Martin is not an employee. J.A. 48 n.10. Even if Mr. Martin were considered an employee, it is noteworthy that in *North*

Haven Board of Education v. Bell, 456 U.S. 512 (1982), this Court held that Section 901 of Title IX, which provides that "no person" may be discriminated against on the basis of gender, covers employees as well as students. The Court's observation that "Congress easily could have substituted 'student' or 'beneficiary' for the word 'person' if it had wished to restrict the scope of § 901(a)" applies equally here. *Id.* at 521.[14]

4. Even Under The PGA's Theory, Casey Martin Is A "Client Or Customer" Of The PGA

Even if the PGA were correct that Title III protects only "clients or customers" at places of public accommodation, Mr. Martin remains covered. The ADA does not define the term "client or customer." A client is commonly understood as "a person who engages the professional advice or services of another" and a customer as "one that purchases some commodity or service." *Webster's Third New International Dictionary* 422, 559 (1993). The PGA declares that "[t]he purpose of PGA Tour is to protect the interests of professional golfers who qualify for membership in PGA Tour, to promote professional golf tournaments for PGA TOUR members, and to further the professional golf careers of PGA TOUR members." PGA's Statement ¶ 3. The PGA staff organizes and administers Q School, plans and operates each tournament, arranges for spectator viewing and television broadcasts, and coordinates with third party tournament sponsors. *See* J.A. 139-44; S.E.R. 235-39. Mr. Martin pays a fee of $3,000 to participate in Q School and pays his own expenses to play in each tournament. J.A. 40; Tr. 814-16. The PGA competitions allow Mr. Martin to focus exclusively on his game and leave the logistics of his

14. The PGA also fails to acknowledge material differences between Titles I and III that will prevent the flight from Title I to Title III envisaged by the PGA. Title I affords money damages to employees, and covered entities must go to greater lengths to accommodate a disabled individual as an ongoing member of their workforce, including finding alternative positions in the organization. Title III only permits suits for injunctive relief to allow *access* to public accommodations, which covered entities may provide in a variety of ways.

performance to others, while at the same time providing a forum to demonstrate his skills and attract third party endorsement. Mr. Martin is clearly a consumer of the PGA's goods, services, facilities, privileges, advantages and accommodations — by virtue of the PGA's providing these benefits, Mr. Martin does not have to personally arrange a display of his golfing skills. That the PGA has additional customers called spectators does not affect this conclusion.

II. GOLF IS A GAME OF SHOT MAKING — NOT WALKING: THE FACTUAL FINDINGS AFFIRMED BELOW SUPPORT THE CONCLUSION THAT THE PGA HAD NOT MET ITS BURDEN THAT PERMITTING MR. MARTIN TO USE A CART FUNDAMENTALLY ALTERS PGA GOLF

A. The Inquiry Turns On Casey Martin's Specific Facts

Title III broadly provides that any private entity that owns, leases or operates a "public accommodation" must make a "reasonable modification" of its "policies, practices, or procedures" when necessary to make its "goods, services, facilities, privileges, advantages, or accommodations" available to individuals with disabilities, unless the PGA demonstrates that such modification would "fundamentally alter the nature" of its "goods, services, facilities, privileges, advantages or accommodations." 42 U.S.C. §12182(b)(2)(A)(ii). Because the PGA conceded that Mr. Martin has a disability, Mr. Martin's only burden was to show that "a modification was requested and that the requested modification is reasonable." *Johnson v. Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1059 (5th Cir. 1997). The PGA has never contended a cart is an unreasonable modification — its Commissioner acknowledged that carts have been a part of the game of golf for 30-40 years. J.A. 270. As the district court properly concluded, "[t]he requested accommodation of a cart is eminently reasonable in light of Casey Martin's disability" because "Casey Martin cannot walk the course, and only a cart will permit him to compete." J.A. 65, 73.

Once Mr. Martin met his burden, the PGA had to permit the modification unless it proved that the modification "would fundamentally alter the nature of the public accommodation." *Johnson*, 116 F.3d at 1059. In seeking to meet its burden, the PGA must "focus[ ] on the specifics of the plaintiff's or defendant's circumstances and not on the general nature of the accommodation." *Id.* at 1060.

The PGA contends that the modification requested by Mr. Martin is unreasonable without ever considering the nature and extent of his disability — facts it deems irrelevant. *See, e.g.*, PGA Br. at 36. The House Report squarely rejected the PGA's position, observing that "public accommodations are required to make decisions *based on facts applicable to individuals* and not on the basis of presumptions as to what a class of individuals with disabilities can or cannot do." H.R. Rep. No. 101-485, pt. 2, at 102 (1990) (emphasis added). Congress' focus on individualized treatment is repeatedly emphasized in the findings of fact set forth as the preamble to the ADA. *See* 42 U.S.C. § 12101(a).[15]

As the Court of Appeals recognized, the fundamental alteration inquiry is "intensively fact-based." J.A. 45. District court findings of fact are entitled to significant deference on appeal. *See, e.g., Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 573-74 (1985).

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15. For example, Congress found that "forms of discrimination against *individuals* with disabilities continue to be a serious and pervasive social problem," 42 U.S.C. § 12101(a)(2) (emphasis added); "discrimination against *individuals* with disabilities persists in such critical areas as . . . public accommodations," *id.* § 12101(a)(3) (same); and that "*individuals* with disabilities continually encounter various forms of discrimination, including . . . failure to make modifications to existing facilities and practices," *id.* § 12101(a)(5) (same).

When interpreting the ADA, this Court has acknowledged the value of consensus among the lower courts. *See Bragdon*, 524 U.S. at 644-45 (drawing support from the consensus of lower courts that ruled an HIV infection was a handicap under the Rehabilitation Act). The lower court opinions in this case are consistent with uniform circuit and district court authority.[16]

This Court has already endorsed an individualized inquiry under the "reasonable accommodation" provision of the Rehabilitation Act. *See School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987). The ADA was modeled after and extended the protections of the Rehabilitation Act, and this Court has held that the two should be interpreted consistently. *See Bragdon*, 524 U.S. at 632 (This Court is required "to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act."). [17] In *Arline*, this Court observed that individualized inquiries are necessary to implement Section 504 of the Rehabilitation Act, which requires employers to make reasonable accommodations for otherwise qualified employees:

> [I]n most cases, the district court will need to conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice,

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16. *See, e.g., Johnson*, 116 F.3d at 1059-60; *Crowder v. Kitagawa*, 81 F.3d 1480, 1486 (9th Cir. 1996) ("[T]he determination of what constitutes reasonable modification is highly fact-specific, requiring case-by-case inquiry."); *Staron v. McDonald's Corp.*, 51 F.3d 353, 356 (2d Cir. 1995) ("[T]he determination of whether a particular modification is 'reasonable' involves a fact-specific, case-by-case inquiry.").

17. Congress specified in the ADA that "[e]xcept as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. § 12201(a).

> stereotypes, or unfounded fear, while giving appropriate weight to [any countervailing considerations].

Arline, 480 U.S. at 287.[18]

Significantly, the Seventh Circuit (the same court that decided *Olinger*) recently applied this guidance from *Arline* in reaffirming the appropriateness of evaluating a plaintiff's individual circumstances under Title II of the ADA. *See Washington v. Indiana High Sch. Athletic Ass'n*, 181 F.3d 840, 851 (7th Cir.), *cert. denied*, 120 S. Ct. 579 (1999). As the *Washington* court noted:

> The entire point of *Arline*'s statement that a person is otherwise qualified if he is able to participate with the aid of reasonable accommodations is that some exceptions ought to be made to general requirements to allow opportunities to individuals with disabilities. To require a focus on the general purposes behind a rule without considering the effect an exception for a disabled individual would have on those purposes would negate the reason for requiring reasonable exceptions.

Id.

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18. This Court also requires an individualized inquiry when determining (a) whether an individual is disabled under the ADA and (b) whether hiring or accommodating an individual poses a "direct threat" to the health and safety of others. *See Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 566 (1999) ("[T]he existence of disabilities [is determined] on a case-by-case basis."); *id.* at 569 ("[The direct threat] criterion ordinarily requires an individualized assessment of the individual's present ability to safely perform the essential functions of the job." (internal quotation omitted)); *Sutton*, 527 U.S. at 483 ("Whether a person has a disability under the ADA is an individualized inquiry."); *Bragdon*, 524 U.S. at 649 ("The existence . . . of a [direct threat] must be determined from the standpoint of the person who refuses the treatment or accommodation."); *id.* at 662 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (agreeing with the *Bragdon* majority that an individualized inquiry is required under the direct threat analysis).

B. The District Court Factual Findings Affirmed By The Court Of Appeals Were Not Clearly Erroneous And Support The Conclusion That Mr. Martin's Use Of A Cart Does Not Fundamentally Alter PGA Competition

1. Walking Is Not Fundamental To PGA Tour Competitions

To determine whether the PGA's so-called walking rule is fundamental to PGA Tour competitions, it is helpful to consider the meaning of the term "fundamental." The dictionary defines fundamental as "serving as a basis supporting existence or determining essential structure or function." *Webster's Third New International Dictionary* 921 (1993). The term "essential" means "constituting an indispensable structure, core, or condition of a thing." *Id.* at 777.

The Rules of Golf make it clear that the essence of the game is shot-making, not walking. J.A. 104. The PGA Commissioner acknowledged that "the essentials" of the game of golf are contained in Rule 1-1 of the Rules of Golf and that "the key element of skill in the game of golf is shot-making." J.A. 261, 269-70. As the district court noted, "*[n]othing* in the Rules of Golf requires or defines walking as part of the game." J.A. 63 (emphasis added). The USGA's *Decisions on the Rules of Golf* state that the Rules *permit* use of a cart during any competition unless prohibited in the conditions for competition of a particular event. J.A. 131, 229, 243. The PGA was unable to produce any document stating directly or indirectly that walking is fundamental to competitive golf. J.A. 261.

Significantly, the Rules of Golf do not prohibit the use of carts or require players to walk. Rather, the Rules of Golf provide a model *optional* condition for a competition to include if the competition wishes to require players to walk. Not only did the PGA not adopt the Rules' optional condition, it adopted a "walking rule" that specifically provides for exceptions. As found by the courts below, the PGA regularly rebuts its contention that walking is fundamental to PGA golf by permitting the use of carts throughout its competitions:

- For 30 years the PGA rules permitted players to use carts in all three stages of the Q School. There is no evidence that over the course of 30 years any player or PGA official *ever* complained that a player who chose to use a cart had an advantage over those players who chose to walk. Only in 1997, the year Mr. Martin played in the qualifying rounds of the Q School, did the PGA for the first time require players to walk in the final stage. J.A. 154, 216, 257-58; S.E.R. 92-94, 192.
- Every golfer who advances to the third stage of Q School is assured of a place on either the PGA or Nike Tour. Yet until the pendency of the appeal of this action, the PGA still did not require any golfer to walk in the first two qualifying stages when testing the skills of players who would become Tour members. J.A. 162-63, 264-65.
- A player can earn the right to play in a single PGA event as an "exempt" entry by playing in the open qualifying event for that tournament and being one of the four lowest-scorers in that event. Carts are permitted for such events. J.A. 161, 262-64.
- The PGA routinely permits all players to ride in carts during PGA and Nike Tour competition for administrative convenience, including when players retrieve a ball hit out of bounds, when a lengthy distance separates a green and the next tee, and sometimes during play of an entire hole. J.A. 157-60, 201-02; S.E.R. 58.
- The PGA permits carts and does not require walking on its highly competitive Senior Tour. J.A. 218, 221-25.[19]

19. The PGA has never questioned the integrity of the Q School, weekly qualifying tournaments, PGA Tour, or Senior Tour competitions in which players have used carts. *See, e.g.*, S.E.R. 192. Similarly, no one ever complained about the integrity of collegiate competitions in which Mr. Martin was granted an exception to requirements that players walk and, unlike PGA competition, carry their own clubs. J.A. 207-08; S.E.R. 79, 228-29.

- The PGA rules provide no handicap or penalty for players who use carts, in contrast to its rules that penalize players for using non-conforming balls or clubs. J.A. 229, 243; *Fay Interview*.

The perception of what is "fundamental" to golf by those involved in the game's highest levels further confirms the centrality of shot-making. Eric Johnson, who won the second tournament on the 1998 Nike Tour and who played on the 1997 PGA Tour, testified that skills relating to stance, setup and swing are the fundamental aspects of the game. This is shot-making. J.A. 204. A former Championship Director of the U.S. Open, who has organized and played in significant tournaments for decades, testified that while "walking adds to the joy and pleasure of the game," it is not an "integral part of the game." J.A. 206; *see also* J.A. 203-04 (Mr. Johnson testified that walking is part of the game only as a way to reach the next shot).

The Court of Appeals also noted the district court's factual finding "that, at the low levels of intensity of exercise involved in untimed walking of a golf course during a competition, 'fatigue . . . is primarily a psychological phenomenon. . . . Stress and motivation are the key ingredients here.'" J.A. 43 (quoting the district court's opinion). The Court of Appeals correctly concluded that "[t]here was ample evidence to support all of these findings, and they are not clearly erroneous." J.A. 43.

Even a small sampling of the evidence below illustrates that the district court's findings were well-grounded in the record:

- Dr. Gary Klug, a professor of physiology at the University of Oregon, testified that walking in competitive golf is not physiologically taxing and does not create an appreciable measure of fatigue. J.A. 210-11; S.E.R. 83-85. Moreover, unlike aerobic sports such as basketball, no cumulative fatigue arises from

successive golf games over a period of tournament play. *Id.* [20]

- Mr. Johnson confirmed Dr. Klug's conclusions from the player's experience. Playing a round of golf in PGA competition does not cause players to break a sweat. J.A. 202. Mr. Johnson testified he does not go to a gym or jog to improve his endurance. He simply does not "consider[ ] physical fatigue in [the game]." J.A. 204.
- A professional round of golf takes longer than a non-professional round because players take longer periods to set up their shots and also must wait for other players to take their shots, which allows them to regenerate energy. *See* J.A. 202.
- Contrary to the PGA's position, the former president of the USGA testified that "[o]bviously [golf is] not a major endurance contest, because otherwise we'd require players to run between shots." J.A. 242.
- Even PGA witness Ken Venturi admitted that the principal cause of fatigue in PGA golf is mental stress caused by the pressure of competition. J.A. 235-37. Indeed, Mr. Venturi admitted playing 36 holes does not induce greater physical fatigue than playing 18. J.A. 238. Mr. Venturi further acknowledged that any fatigue inherent in PGA golf is stress related: "You know, if you are shooting 80 [a poor score in PGA golf], you don't get fatigued." J.A. 236.
- Mr. Venturi and the other PGA witnesses who testified that riding reduces a perceived fatigue factor admitted they were speaking generally about able-bodied hypothetical golfers and not about Mr. Martin. J.A. 238; *see also* J.A. 177-78, 191. None of the PGA witnesses who testified about the purported fatigue factor had any knowledge about the nature and extent of Mr. Martin's disability. *See* J.A. 177-78, 185, 191, 258-59.

20. The PGA's argument that PGA Tour golfers suffer cumulative fatigue from walking the golf course on successive days is further refuted by the testimony of the PGA's Commissioner, who testified that the scores for the majority of finishers of a golf tournament are generally lower on the last day than the first day. Tr. 857-59.

The most compelling evidence that walking during competitive golf does not induce fatigue comes from the actions of players who understand that one shot may determine the outcome. As the district court noted, when given the choice to ride or walk a competitive round of golf, most golfers choose to walk. J.A. 68, 167, 179, 201, 209, 214, 225. At the final stage of the 1997 Q School, after the district court had issued the preliminary injunction, the Commissioner decided to make cart use optional for all participants. S.E.R. 95. Mr. Martin testified that he saw only 5 or 6 of the 168 other participants using carts. J.A. 231. As Stanford's golf coach testified, it is a "huge disadvantage to have to ride around in a cart," and he would be "exhilarat[ed]" if an opposing team all used carts. J.A. 208-09. Professional golfers generally prefer to walk for several reasons unrelated to the demands made upon the player when hitting shots — walking helps the golfer (a) relieve stress; (b) assess wind conditions; (c) assess course features and conditions; and (d) stay warm in chilly weather. *See, e.g.*, J.A. 179-80, 214; S.E.R. 43-44, 139-40. Even the PGA's Commissioner acknowledged that walking in certain circumstances provides a competitive advantage over riding. S.E.R. 194.

In short, the PGA has produced no document, and pointed to no statement, made by anyone prior to the trial of this action suggesting that fatigue is an important element in the game of golf.[21] The district court found that the element of fatigue is not

21. Amicus USGA believes that it developed a better record supporting its position in *Olinger* than the PGA developed here. *See, e.g.*, USGA Br. at 4. Their assertion underscores that far from announcing any broad split with the Court of Appeals, the Seventh Circuit simply affirmed a district court holding based on findings of fact made "after a full trial" in which the evidence received was quite different than the evidence heard by the court in *Martin*.

(Cont'd)

fundamental to PGA golf competitions. The PGA has failed to show that the district court's findings were clearly erroneous. *See Concrete Pipe*, 508 U.S. at 623; *Anderson*, 470 U.S. at 574.

2. The PGA Cannot Refuse To Consider Mr. Martin's Request

The PGA seeks to litigate this case as if the ADA does not exist. It misstates the Court of Appeals' holding and analysis, asserting that the Court of Appeals reshaped Title III into a vehicle to "create a more level playing field for competitors *of different physical ability*." PGA Br. at 36 (emphasis added). In fact, the Court of Appeals carefully confined its ruling to the PGA's discriminatory conduct toward Mr. Martin in failing to comply with the ADA's mandate that it reasonably accommodate his permanent disability. The Court of Appeals clarified that its holding, which was expressly based on the unique factual record developed at Mr. Martin's trial, carried no far-reaching effect:

> The nature of the district court's findings reflect the fact that whether an accommodation fundamentally alters a competition is an intensively fact-based inquiry. For that reason, we reject PGA's argument that permitting Martin to use a golf cart would open the door to future decisions requiring that disabled swimmers or runners be given a head start in a race. . . . We have little doubt that fact-based inquiries into the effects of such accommodations

(Cont'd)

See Olinger, 205 F.3d at 1004. The district court in *Olinger* stated that "this case is different from the *Martin* case," and emphasized important differences in both the factual records of the cases and the nature of the competitions to which the respective individuals sought access. *Olinger*, 55 F. Supp. 2d at 933 n.4. The Seventh Circuit acknowledged the district court decision in *Martin*, but never suggested that its holding was inconsistent with *Martin*. The *Olinger* district court stated it was making an "individualized decision concerning the plaintiff." *Id.* at 937. Thus, any differences in the decisions arise from differing factual records, not from conflicts on the law.

> would result in rulings that those accommodations fundamentally altered the competitions.

J.A. 45.

The PGA argues that it should not have to entertain Mr. Martin's request because it deems its walking requirement "substantive," which in litigation it defines as "a rule that is intended to, and potentially does, affect the outcome of a particular competitive event." *See* PGA Br. at 10 n.12.[22] But Congress specifically foreclosed retreat to "facially neutral" rules, and rejected attempts to justify exclusion based on disability because "the rules are the rules." *See, e.g.*, *Crowder*, 81 F.3d at 1484; *Thomas v. Davidson Acad.*, 846 F. Supp. 611, 619 (M.D. Tenn. 1994) (The ADA forecloses "blind adherence to policies and standards resulting in a failure to accommodate a person with a disability."). The Court of Appeals properly rejected the PGA's argument, recognizing that "[t]he mere fact that PGA has defined walking to be part of the competition cannot preclude inquiry, or PGA will have been able to define itself out of the reach of the ADA." J.A. 45. The Court of Appeals exposed the fatal flaw in the PGA's argument:

> The difficulty with [the PGA's] position is that it reads the word "fundamentally" out of the statutory language, which requires reasonable accommodation unless PGA can demonstrate that

22. The PGA's attempt to equate its rule against using carts with other requirements of the Hard Card such as the one-ball rule, which requires players to use the same brand of ball throughout play, and limiting players to 14-clubs during a round, is misguided. Those requirements directly affect the shot-making aspect of golf, and an alteration of those requirements for one player could provide a shot-making advantage. J.A. 232-33; S.E.R. 63. After a six-day trial, the district court made detailed factual findings — affirmed by the Court of Appeals — based on evidence showing that "the fatigue factor injected into the game of golf by walking the course cannot be deemed significant under normal circumstances" and that "providing Martin with a golf cart would not give him an unfair advantage over his competitors." J.A. 43, 48.

> the accommodation would "fundamentally alter the nature" of its competition.

J.A. 44 (quoting 42 U.S.C. § 12182(b)(2)(A)(ii)).[23]

In *Bragdon*, this Court held that even defendants with special expertise are not exempt from judicial review under the ADA. *Bragdon*, 524 U.S. at 649 ("[Health care professional's] belief that a significant [health] risk existed, even if maintained in good faith, would not relieve him from liability. . . . [P]etitioner receives no special deference simply because he is a health care professional."). The *Crowder* court underscored the need for judicial review:

> The court's obligation under the ADA . . . is to ensure that the decision reached by the [defendant] is appropriate under the law and in light of proposed alternatives. Otherwise, any [defendant] could adopt requirements imposing unreasonable obstacles to the disabled, and when haled into court could evade the antidiscrimination mandate of the ADA merely by explaining that the [defendant] considered possible modifications and rejected them.

Crowder, 81 F.3d at 1485.

The PGA returned Mr. Martin's documentation of his permanent disability, including a videotape demonstrating the severity of his condition, without even opening the envelope. *See* J.A. 51-52, 218, 232; S.E.R. 201-02. Having refused even to look at Mr. Martin's medical records, the PGA asserts that it would be unduly burdensome for it to comply with the ADA's required case-by-case evaluation of disability. PGA Br. at 39.

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23. Seeking to create the impression that the decision below has broad ramifications, the PGA argues that this case concerns "whether Title III compels the Tour to grant selective waivers of its substantive rules in order to accommodate disabled competitors." PGA Br. at 2. But no rule of the PGA Tour has to be changed for Mr. Martin. He only asks that the PGA Tour Rules Committee apply its existing rule, which already provides for exceptions to its prohibition against carts.

As the Court of Appeals noted, however, "[n]othing in the record establishes that an individualized determination would impose an intolerable burden on PGA." J.A. 47.[24]

The Rules of Golf expressly provide for individual determinations of whether particular modifications for players with disabilities confer a competitive advantage. Ruling 14-3/15 in the USGA's *Decisions on the Rules of Golf* (Plaintiff's Trial Exhibit 105, Tr. 626), interpreting Rule 14-3 concerning use of "artificial devices and unusual equipment," states that an artificial limb is generally not considered a forbidden artificial device under the Rules of Golf. *Id.* "However, if the Committee believes that an artificial limb . . . would give the player an undue advantage over other players, the Committee has authority to deem it to be an artificial device contrary to Rule 14-3." *Id.*

In addition, the PGA regularly makes these individualized determinations pursuant to an extension rule for PGA members who miss certain events because of a medical condition. The Commissioner testified that the PGA reviews a PGA or Nike Tour player's medical condition and generally accepts a treating physician's conclusion that the player missed a tournament for medical reasons. The PGA then permits this *temporarily* disabled player to return to the Tour (to the extent determined by a formula) *without having to return to Q School*, which the PGA concedes gives the exempt player an advantage on the basis of disability over those who must qualify. *See* J.A. 269; Tr. 871-72. Thus, the PGA is already evaluating the medical condition of golfers and is willing to make judgments about the effect of even a temporary disability on the ability to play for one of its own. The ADA prohibits the PGA from refusing

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24. In the three years since Mr. Martin petitioned for a cart, no one has sued the PGA, and only two golfers (Ford Olinger and JaRo Jones) have sued the USGA, seeking to use carts in professional competitions. Given the nature of the sport, it is highly unlikely that many individuals with disabilities will possess both the shot-making skills required for PGA play and the tenacity to overcome the type of disability suffered by Mr. Martin on a daily basis.

to exercise its demonstrated ability to evaluate golfers with disabilities when the request is from a golfer seeking to play on the tour.

3. Mr. Martin Does Not Have An Advantage Over Other PGA Tour Players

If the PGA had evaluated Mr. Martin's condition as required by the ADA, it could not believe for an instant that he has a competitive advantage using a cart. Even with a cart, Mr. Martin (who is unable to do aerobic exercise) must walk an appreciable part of the course, "100 yards for a 400-yard hole, at least." J.A. 230. The district court correctly found that Mr. Martin must walk about twenty-five percent of the course because the cart cannot be brought near the ball in many cases. J.A. 69. The district court summarized the effect on Mr. Martin as follows:

> [Mr. Martin] is in significant pain when he walks, and even when he is getting in and out of the cart. With each step, he is at risk of fracturing his tibia and hemorrhaging. The other golfers have to endure the psychological stress of competition as part of their fatigue; *Martin has the same stress plus the added stress of pain and risk of serious injury. . . . To perceive that the cart puts him — with his condition — at a competitive advantage is a gross distortion of reality.*

J.A. 69 (emphasis added); *see also* J.A. 198-200, 227.[25]

The Court of Appeals observed that the fact-intensive issue of whether permitting Mr. Martin to use a cart would provide an unfair advantage was "fully tried in the district court."

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25. These findings distinguish the present case from *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), a case brought under the Rehabilitation Act of 1973, in which this Court held based on the factual record before it that a nursing program need not make fundamental alterations to its program in order to enroll a student who had a hearing limitation that could interfere with her safely caring for patients. *Id.* at 413.

J.A. 43. The Court of Appeals summarized the evidence concerning the nature of Mr. Martin's disability and his inability to walk a golf course and agreed with the district court's conclusion that "permitting Martin to use a golf cart . . . would not fundamentally alter the nature of those competitions." J.A. 43. The Court of Appeals concluded:

> All that the cart does is permit Martin access to a type of competition in which he would otherwise could not engage because of his disability. That is precisely the purpose of the ADA.

J.A. 44.[26]

The PGA has never attempted to show that the district court's findings were clearly erroneous. Instead, the PGA is largely reduced to platitudes to defend its choice — which is a matter of taste, not the essentials of golf — to require walking. This is exactly the kind of otherwise benign "custom" that the ADA was enacted to modify.

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26. The PGA's argument that Mr. Martin could have an advantage over golfers with "debilitating (though not necessarily 'disabling') conditions" (PGA Br. at 14) ignores that "disability" is a statutory term. If (as here) an individual proves a disability, he or she is protected by the ADA and must be reasonably accommodated at places of public accommodation unless the proposed modification would result in fundamental alteration.

The conjecture offered by the PGA and USGA cannot satisfy the PGA's burden of proving a fundamental alteration. *See* PGA Br. at 40 n.28 ("It is certainly arguable that respondent . . . has a distinct advantage."); USGA Br. at 23 n.9 ("If that competitor had been permitted to use a golf cart, he *might have* improved his score." (emphasis added)); Tr. 862 (Mr. Finchem speculated "I *assume* that riding in a golf cart in certain instances, on certain topography, in certain conditions, is an advantage." (emphasis added)). Such speculation does not satisfy the PGA's burden of proof, and certainly cannot justify overturning the district court's factual findings as clearly erroneous. *See Colorado v. New Mexico*, 467 U.S. 310, 324 (1984) ("[E]videntiary burden cannot be met with generalizations . . . and unstudied speculation.").

III. GRANTING CASEY MARTIN EQUAL ACCESS FURTHERS THE ADA AND WILL NOT UNDULY BURDEN SPORTS ORGANIZATIONS

Ultimately, the PGA and its amici seek to justify the PGA's refusal to comply with the ADA by conjuring slippery slope scenarios. They suggest this Court should interpret the absence of express discussion by Congress of "championship-level athletic competitions" in the ADA (USGA Br. at 5; *see* PGA Br. at 22) as evidence of an intent to exclude such events from statutory coverage. This Court has recently unanimously rejected that argument under the ADA:

> [A]ssuming . . . that Congress did not "envision that the ADA would be applied [in suggested manner]," . . . *in the context of an unambiguous statutory text that is irrelevant*. . . . [T]hat a statute can be "applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. *It demonstrates breadth*."

Yeskey, 524 U.S. at 212 (emphasis added) (internal quotation omitted); *see Brogan v. United States*, 522 U.S. 398, 403 (1998) ("[I]t is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy — even assuming that it is possible to identify that evil from something other than the text of the statute itself.").

Nothing in the legislative history suggests that Congress intended to exempt the sports world from the ADA. To the contrary, one of the original bill sponsors testified:

> Society has neglected to challenge itself and its misconceptions about people with disabilities. When people don't see the disabled among our co-workers, or on the bus, or at the *sports field*, or in a movie theater, most Americans think it's because they can't. It's time to break this myth. The real reason people don't see the disabled among their co-workers, or on the bus, or at the *sports field*, or in a movie theater

> is because of barriers and discrimination. Nothing more.

Americans with Disabilities Act of 1988: Joint Hearing on S. 2345 Before the Sen. Subcomm. on the Handicapped of the Comm. on Labor and Human Resources and the House Subcomm. on Select Educ. of the Comm. on Educ. and Labor, 100th Cong. 15 (1988) (emphasis added) (statement of former House Majority Whip Tony Coelho).

Moreover, professional sports organizations including the NBA, the NFL, the NHL and Major League Baseball appeared before Congress during its consideration of the ADA. None of these organizations suggested that the ADA would not apply to them. Instead, they sought guidance from Congress concerning whether drug-testing programs for *players* would comply with the ADA. *See* H.R. Rep. No. 101-485, pt. 2, at 80-81 (1990).

The PGA's suggestion that permitting Mr. Martin to use a cart will provoke complaint from other golfers that Mr. Martin has an advantage is belied by experience. As more PGA Tour golfers have watched Mr. Martin and seen his condition, they have increasingly supported his use of a cart. Jack Nicklaus, who testified against Mr. Martin in the district court, has now changed his position and stated that the PGA Tour should provide him a cart. *See* Hunki Yun, *Casey and the Cart – Martin Set for PGA Tour Debut*, Orlando Sentinel, Jan. 19, 2000, *available at* 2000 WL 3573262; Joe Hamelin, *Martin's Debut Solid Under Pressure*, The Press-Enterprise, Jan. 20, 2000, *available at* 2000 WL 7012432. Tiger Woods, when asked whether the PGA Tour should allow Mr. Martin to ride in a cart, stated "[t]hat would be a very sympathetic thing for the PGA to do. It would make them look very good." Ron Rapoport, *Smiling Was Easy With Payne Around*, Chicago Sun-Times, Oct. 26, 1999, *available at* 1999 WL 6562704.[27]

27. Other golfers who support Mr. Martin include eight time major-winner Tom Watson, two-time British Open champion Greg Norman, former PGA Championship winner Paul Azinger (who himself battled cancer to return to the PGA Tour), former British Open champion (Cont'd)

The PGA's concern that accommodating Mr. Martin will ripple into other sports is overstated. Requiring reasonable accommodations for people with permanent disabilities does not force sports organizations to change the nature of the game to allow people who lack the core skills needed to compete. Someone who cannot run is not qualified to participate in a footrace. But if a player qualifies by demonstrating exceptional ability in the sport's essential skills, his permanent disability unrelated to the sport should not exclude him from using that ability.[28]

The PGA's argument that providing Mr. Martin with a cart will lead others to challenge the integrity of its competitions is also belied by experience. The Australasian PGA Tour, the highest-level tour in Australia and parts of Asia, recently granted a cart to Australian pro golfer Nigel Lane, who has arthritis in both feet.[29] *See* Associated Press, *Another Golfer Can Use Motor Cart*, Feb. 9, 2000, *available at* 2000 WL 12389828. The European PGA Tour, the highest level tour in Europe, offered two-time Masters Champion Jose Maria Olazabal a cart in two of its events after he suffered a serious foot injury. *See* Yi-Wyn Yen, *One Rides A Cart, The Other Refuses - Olazabal*

(Cont'd)

Tom Lehman, two-time winner on the 2000 PGA Tour Notah Begay, two-time U.S. Open champion the late Payne Stewart, and even PGA Tour Policy Board member John Cook. *See Opinions Divided on Issue*, USA Today, Jan. 18, 2000, *available at* 2000 WL 5766388; *The International Will Be Twice as Nice*, The Boston Globe, Jan. 23, 2000, *available at* 2000 WL 3311547; Larry Guest, *Rivals are Pouncing on UCF's Troubles*, Orlando Sentinel, Jan. 29, 1998, *available at* 1998 WL 5325429.

28. Contrary to the PGA amici's "slippery slope" hypotheticals, the ADA does not protect individuals with temporary ailments. The ADA does not cover the average person ill from the flu or incapacitated by short term surgery. *See* 29 C.F.R. ch. 14, pt. 1630, § 1630.2(j) (defining "substantially limits"); 29 C.F.R. ch. 14, pt. 1630, App., § 1630.2(j) (interpreting § 1630.2(j)).

29. This fact squarely contradicts the PGA's assertion that "[t]he importance of the rule [against carts] is reinforced by the fact that it is observed, not just in the highest-level Tour events, but in every other comparable golf tournament throughout the world." PGA Br. at 14.

Appreciates Martin's Plight, The Star Ledger, June 21, 1998, *available at* 1998 WL 3424879. In addition, the PGA of America, which sponsors events for club and non-touring professionals, permits golfers to use carts. J.A. 214.

Other sports have also made accommodations for disabled athletes who have shown that they can meet the essential skills of the sport. For example, former major league baseball player Jim Abbott, who was born without a right hand, recounts how baseball adjusted one of its rules for him:

> So what if the PGA Tour has to adjust its rules in order to help Casey compete? Baseball did a similar thing for me. It allowed me to spin the ball even though the strictest interpretation of the rules state that a pitcher must remain completely still before his delivery. But since I couldn't keep the ball in my glove — I had to switch the glove to my left hand immediately after I finished my release to the plate — baseball made an exception. It meant that batters wouldn't be able to see my grip and thus be tipped off to what pitch I would be throwing. I wasn't given an advantage; I was merely being allowed to do something that everyone else was able to do naturally.

Jim Abbott, *It's Easy to Accommodate*, Golf World, Feb. 20, 1998, at 92. Former professional football player Tom Dempsey, who still shares the record for the longest field goal in NFL history, wore a special kicking shoe approved by the league. *See* Murray Chass, *Pro Football: 63 Yard Field Goal*, The New York Times, Nov. 9, 1970, at 58; *cf.* PGA Br. at 13 ("[N]o sport grants waivers of its substantive rules to selected players.").

Mr. Martin has not invoked the ADA to "raise" him to the level of the "able-bodied." PGA Br. at 15. That cannot happen without divine intervention. Mr. Martin does not ask that he be absolved from having to strike the ball into the hole, nor does he argue that any Rule of Golf must be changed for him.

He merely seeks removal of a barrier interposed by the PGA that prevents him from pursuing a career where his talents lie. *See* J.A. 44 ("All that the cart does is permit Martin access to a type of competition in which he otherwise could not engage because of his disability."). The ADA requires the removal of such barriers.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below.

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IN THE

Supreme Court of the United States

PGA TOUR, INC.,

Petitioner,

v.

CASEY MARTIN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

The briefs filed by respondent and his supporting *amici curiae* spend much of their time addressing issues that are not in dispute. On the specific issues that we raise, however, they have less of value to say. As we discuss below, Title III does not apply to claims by persons providing services to—in particular, claims by persons working for—the operator of a place of public accommodation. *See* pages 1-12 *infra*. Furthermore, if it did, it would not require the Tour to alter its highest-level golf tournaments either by allowing one competitor to play without full compliance with its substantive rules or by eliminating the rule with which he is unable to comply. *See* pages 12-20 *infra*.

I. TITLE III OF THE ACT DOES NOT REGULATE THE WORKING RELATIONSHIP BETWEEN THE OPERATOR OF A PUBLIC ACCOMMODATION AND THE PERSONS THAT IT HIRES

It may be useful, at the outset, to clear some underbrush. We do not question that Tour events generally are played at places

of public accommodation. *See, e.g.*, Resp. Br. 16-25; US Br. 5-14. We agree that Title III bars discrimination against persons seeking to obtain goods and services offered at places of public accommodation, including persons seeking to obtain exercise or recreation at places that offer exercise or recreation to the public. *See, e.g.*, US Br. 20-24; NAPAS Br. 12-15. We agree that the opportunity to participate in athletic competitions can be among the goods and services offered to persons at places of public accommodation—for example, it may be offered to customers at places of exercise or recreation or to students at schools and universities—and that Title III thus may apply to participants in those particular competitions. *See, e.g.*, US Br. 12-14. And we recognize that the operator of a place of public accommodation can sometimes offer different types of goods and services to different categories of customers. *See, e.g.*, NAPAS Br. 11-12.

Our position is simply this: that Title III does not provide a basis for claims by persons that seek to furnish goods and services to, rather than obtain goods and services from, the operator of a place of public accommodation. In particular, we submit that the opportunity to work for the operator of a place of public accommodation is not a good or service that is offered to the public by a place of public accommodation. A person thus cannot bring a claim under Title III challenging the terms and conditions established by the operator of a place of public accommodation for the workers that it hires. That is so when the person seeks a position with the operator as an employee, and it is equally so when, as here, he seeks a position with the operator as an independent contractor. Regardless of his status, the worker in both cases is seeking to provide services to the operator, not receive them from the operator. His claim of discrimination thus arises under Title I of the Act, or not at all.

That principle controls this case. By the terms of his own complaint, respondent is seeking to challenge the terms and conditions (*i.e.*, adherence to the competitive rules) that the

Tour has established for golfers seeking to perform as part of its events. Although the professional golfers on the Tour are independent contractors, not employees—they are free to play in tournaments not affiliated with the Tour, and to earn endorsement and other income—they are nonetheless an integral part of the package of Tour events offered to spectators and television viewers, and the Tour compensates the golfers for their work based on performance. Respondent is thus no different from an insurance agent, lawyer, teacher, or many other kinds of workers that provide services to an operator of a place of public accommodation. Like them he has no cognizable Title III claim.

A. Title III declares that "no individual" shall be discriminated against on the basis of disability if that discrimination denies "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation . . . ." 42 U.S.C. § 12182(a). Although it is possible to read that language as allowing *anyone* at a place of public accommodation to bring a Title III claim—a view adopted by respondent, *see* Resp. Br. 25 ("Congress extended the protections of Title III to all 'individuals' at 'places' of 'public accommodation,' without limiting their purpose for being there or the uses being made of the facility")—this reading is at odds with the reading given by several *amici* supporting respondent, all of whom acknowledge that employees at a place of public accommodation cannot bring claims under Title III. *See* page 5 *infra*. More importantly, it conflicts both with the most natural meaning of the statutory language, which indicates that Title III is concerned with discrimination against potential *recipients of* (*i.e.*, persons seeking to "enjoy[]") whatever goods and services are offered to the public, and with a related provision of Title III, which, in affording protection to an "individual or class of individuals," defines those words in terms of the "clients or customers" of a place of public accommodation. *See* 42 U.S.C.

§ 12182(b)(1)(A)(iv).[1] (As several *amici* point out, the phrase "clients and customers" effectively serves as a shorthand reference describing the persons who "partake of" (US Br. 28) or "seek[]" (NAPAS Br. 13) the goods and services provided by places of public accommodation.) All this, then, leads to the critical question: whether a person seeking the opportunity to work for, or otherwise provide services to, the operator of a place of public accommodation is seeking to obtain a good or service that the place of public accommodation offers the public. In our view, he plainly is not.

First of all, as a matter of common language, it is hard to think that the prospect of working for a business is among the "goods, services, facilities, privileges, advantages, or accommodations" that members of the public are seeking to "enjoy[]." The usual understanding of the activities of a place of public accommodation is that the entity operating the public accommodation is supplying goods or services (which, of course, vary according to the nature of the public

[1] Even though that definition does not apply directly to the general provision prohibiting discrimination, *see* Pet. Br. 19-21, respondent and his *amici* offer no explanation for why Congress in Title III would protect persons *in addition to* "clients or customers" in one provision but *only* "clients or customers" in the other. Absent a good explanation, and we think that there is none, it is reasonable to think that the term "clients and customers" provides a useful working description of the persons protected by Title III. *See* NAPAS Br. 13 (words "embrace any individual who is covered" by Title III).

Respondent objects to our discussion of the "clients or customers" language, Resp. Br. 25-26, saying that it was not addressed below. But the Tour has argued throughout that Title III does not apply to the competitions conducted by the Tour, and the discussion of the term "clients and customers" is, like the other arguments advanced here, an argument in support of that position. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*, 120 S. Ct. 2180, 2187 n.2 (2000) (internal quotes omitted).

accommodation) to persons seeking to obtain those goods and services. The workers hired by the public accommodation to provide goods and services to the recipients are not themselves normally regarded as recipients of goods and services; they are, by virtue of their working relationship with the operator, part of the goods and services that the public accommodation is offering. Indeed, the definitions in the Act specifically define a "public accommodation" in terms of the kinds of goods and services that it makes available to the public, not by the kinds of opportunities that it extends to potential workers. *See* 42 U.S.C. § 12181(7)(A)-(L).[2]

It would also distort the Act as a whole to treat the opportunity to work for the operator of a place of public accommodation as a good or service that the public accommodation offers. Because the words "good" or "service" provide no basis for distinguishing among different types of working relationships, they would, if they covered such work relationships at all, presumably include the opportunity to work for the operator in *any* capacity, including as an employee or as an independent contractor. Although respondent apparently endorses this sweeping proposition, Resp. Br. 25, several of the supporting *amici* explicitly disavow it. *See* US Br. 18-19 n.17; NAPAS Br. 15; Dole Br. 14. Either directly or indirectly, they accept the contrary view set forth in the relevant House Report, which expressly declares that "Title III is not intended to govern any terms or conditions of employment by providers of public accommodations or potential places of employment; employment practices are governed by title I of this legislation." H.R. Rep. No. 101-485, pt. 2, 101st Cong., 2d Sess. 99 (1990) (House

[2] Although respondent (Resp. Br. 22-23) seeks to rely on *Daniel v. Paul*, 395 U.S. 298 (1969), a case brought under Title II of the Civil Rights Act of 1964, that case has nothing to do with any disputed issue here. We have acknowledged that Title III of the Disabilities Act, like Title II of the Civil Rights Act, bars discrimination against persons seeking to use public accommodations for purposes of recreation or entertainment. *See* Pet. Br. at 24 n.18.

Report). That view is correct. Nothing in the text of Title III, or in the legislative record, indicates that Title III is meant to supplement the protections of Title I by addressing discrimination against employees who happen to work for the operator of a place of public accommodation, and that reading would lead to potential work-related lawsuits against the kinds of small businesses (*e.g.*, bakeries, barber shops, dry cleaners) that Congress quite deliberately did not make subject to the provisions of Title I. *See* Pet. Br. 24-30.

We thus think it apparent that, if the Tour "employed" respondent to do precisely what he does now, his objection to the conditions set for Tour golfers would fall outside the boundaries of Title III. Several *amici*, therefore, try to draw a distinction between employees and independent contractors, contending that, even though Title III does not give rise to workplace claims by employees, it does give rise to workplace claims by independent contractors. *See* US Br. 16-20; NAPAS Br. 15-17. But this theory does not square with any reasonable interpretation of the statutory text. Once it is understood that employees do not fit within the category of "individual[s]" seeking to obtain "goods and services" at a place of public accommodation, it follows, as a matter of ordinary statutory interpretation, that other persons seeking to work for the operator necessarily fall outside that category as well. An independent contractor no more seeks to obtain "goods and services" (if they do not include "work") from the operator of a public accommodation than an employee does. The terms of the Act thus cover both or neither.

The notion that Title III covers claims by independent contractors, but not employees, would also lead to a most peculiar statutory scheme. According to that scheme, the workers specifically favored by Congress in the Act (employees) would be disfavored under Title III, while, at the same time, Title III would suddenly furnish a basis for claims by other workers (independent contractors) that Congress, when directly dealing with the subject of work-related claims, chose

not to cover at all. Although the United States tries to justify this irrational distinction, saying that employees working for employers with fewer than 15 employees "are (unlike independent contractors) *expressly* excluded from coverage under Title I . . . ," US Br. 18-19 n.17 (citing 42 U.S.C. § 12111(5)(A)), this argument simply misstates what Title I says. The text of Title I does not "expressly" deny protection to employees at smaller employers: rather, it implicitly excludes them because they are not in the category of workers that, through the interplay of definitions in Title I, are *expressly included* in the provisions granting protection. Exactly the same thing is true for independent contractors. They are not within Title I because they are not within the included category of "employees" of a covered "employer."

The practical effects of applying Title III to claims by independent contractors would be even more extraordinary and unanticipated than applying it to claims by employees. As the briefs supporting respondent well demonstrate, the extension of Title III to claims by independent contractors would raise the prospect of lawsuits by workers ranging from performers in a theatrical production to messengers and office equipment repairmen at a law office. *See, e.g.*, Resp. Br. 24-25; K-T Support Group Br. 9. Nothing in Title III suggests any such open-ended application. While some persons performing work-related activities at a place of public accommodation (for example, a writer doing research at a library) are properly deemed to be receiving goods and services—just like other members of the public making use of the same facilities—that class cannot reasonably be expanded to include persons who are there specifically to provide services to the operator of the public accommodation (for example, the librarian). The latter simply fall on the wrong side of the recipient/provider line.

The position taken by respondent and his *amici* would also obliterate the distinction between parts of a public accommodation open to clients or customers (accessible under Title III) and those parts reserved for persons hired by, or providing

services to, the operator of the public accommodation (not accessible under Title III). *See* USGA Br. 8-19. Although the United States seems to imply that every area in a place of public accommodation must be treated as open to the public in all respects, US Br. 16 n.15, this idea not only is implausible on its face, but is inconsistent with the relevant Department of Justice regulations, which acknowledge that areas of a mixed-use facility "not open to the general public" are "not subject to the requirements for public accommodations." 28 C.F.R. ch. 1, pt. 36, App. B, at 624. For that reason, it is generally accepted that members of the general public have no right to enter into private areas at places of public accommodation, or to make use of facilities offered to workers alone. *See, e.g., Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237, 1241 n.5 (11th Cir. 2000); *Jankey v. Twentieth Century Fox Film Corp.*, 14 F. Supp. 2d 1174 (C.D. Cal. 1998), *aff'd*, 212 F.3d 1159 (9th Cir. 2000). The fact that places reserved for persons providing services are off limits, however, underscores the understanding that Title III is concerned with potential discrimination against clients and customers of a place of public accommodation, not the workers that it hires. The public simply does not receive goods and services in these closed-off areas.

The regulations promulgated under Title III reinforce this view. Although the United States relies (US Br. 9-12) upon these regulations to argue a point that we do not contest—that Title III can sometimes apply to "competitive athletics"[3]—the

[3] As we have indicated, *see* page 2 *supra*, Title III will apply because the participants in most athletic competitions are naturally regarded as receiving the goods and services of a place of exercise or recreation or of an educational institution (which usually offer competitive athletics to their students). In addition, of course, Title I applies to employees working for covered employers that engage in competitive athletics. Thus, when "Congress specifically considered the implications of the Disabilities Act for drug-testing programs conducted by 'professional sports leagues,'" US Br. 8 (citation omitted); *see also id.* (quoting portions of legislative history), it did so in the process of considering the provisions of Title I, not Title III.

most telling thing about its discussion of the regulations is that it cannot cite to a single example that has anything to do with the working relationship between the operator of a place of public accommodation and the people (whether employees or independent contractors) that it hires.[4] This is not a matter of mere oversight; the sole focus of the pertinent Justice Department regulations is upon the treatment accorded to patrons of places of public accommodation. *See* Pet. Br. 27. That focus echoes the discussion of Title III in the legislative history, which likewise (and unlike the discussion of Title I) deals with discrimination against persons obtaining goods and services at a place of public accommodation, not persons providing them. *Compare* House Report, pt. 2, at 99-129, pt. 3, at 53-69 (discussing Title III) *with* House Report, pt. 2, at 54-83, pt. 3, at 31-49 (discussing Title I). Thus, the text of Title III, its legislative history, and the regulations promulgated thereunder all point to the same conclusion: Title III does not govern the working relationship between the operator of a place of public accommodation and the workers that it hires.

B. Confronted by this statutory and regulatory landscape, respondent and various *amici curiae* argue that the relationship between respondent and the Tour is not really a working relationship after all, but just the opposite: a relationship in which respondent (as a "client or customer") is seeking to

[4] The examples cited by the United States all deal with the distinct provisions requiring public accommodations and "commercial facilities" (which are not even subject to other provisions of Title III) to construct new facilities and to alter existing facilities in accordance with particular guidelines. *See* 42 U.S.C. § 12183. While the House Report indicates that new construction and alterations to existing facilities generally should make both work and public areas accessible to disabled persons, *see* House Report, pt. 2, at 116-21, pt. 3, at 62-66, the Report makes clear that this provision is not meant to convert Title III into a alternative version of Title I, imposing supplemental job standards for individual employees at public accommodations. *See* House Report, pt. 2, at 117. "The legal requirements of the two titles . . . are separate and independent." *Id.* *See also* Equal Employment Advisory Council Br. 10-12.

obtain services from the Tour. *See* Resp. Br. 30-31; US Br. 19-20, 23-24; NAPAS Br. 15-17. This portrayal is contradicted by the record and, in any event, wholly unconvincing.

Most notably, the picture of respondent-as-consumer is belied by his own claims. In his complaint, respondent specifically asserted a claim of "Employment Discrimination," alleging that the Tour had "discriminated against him because of his disability in regard to job application procedures, hiring, advancement, employment compensation, job training and other terms, conditions and privileges of employment." J.A. 96. Although this claim was brought under Title I of the Act, it is, for all intents and purposes, identical to his Title III claim. While the "Employment Discrimination" claim is set out in the statutory language of Title I, and the "Public Accommodation" claim is set out in the statutory language of Title III, there is no substantive difference between them. Each rests upon exactly the same grievance: that "[respondent] cannot effectively compete in the NIKE TOUR or the PGA TOUR or obtain compensation, benefits, privileges or advantages from the NIKE TOUR or the PGA TOUR unless he is permitted to use a golf cart in NIKE or PGA TOUR events." J.A. 93. That is a claim seeking the opportunity to work in Tour events, pure and simple.

The work-related nature of the claim is also apparent from the evidentiary record. The district court observed that "the Tour is part of the entertainment industry, offering competitive athletic events to the public, which in turn generate sponsorship of the events, network fees, advertising revenue, and, ultimately, the tournament prize money awarded the competitors." J.A. 79. To offer these "competitive athletic events," the Tour calls upon approximately 200 professional golfers, each of whom commits to play in a minimum of 15 tournaments each year. Although the Tour is not the sole source of income for its players—apart from their commitment to the Tour, they are free to play in professional events not conducted by the Tour, to appear in exhibitions, and to earn often highly-lucrative endorsement

income—it does offer the golfers enough potential compensation to assure that they play for the Tour on a regular basis, thereby providing the continuity from event to event that golfing fans want and expect. Respondent himself has explicitly acknowledged that Tour "revenue is contingent on the PGA-employing touring golf professionals such as Mr. Martin." Brief for Casey Martin, C.A. 9, at 56.[5]

The effort to cast respondent as a consumer of goods and services also misses a basic point. Although respondent and his *amici* talk of various benefits flowing from the Tour to its member golfers, it turns out on closer examination that what respondent, and other Tour golfers, are said to receive are merely things that flow directly and exclusively *from their agreement to work for the Tour*. Thus, whereas respondent asserts that "[t]he PGA competitions allow Mr. Martin to focus exclusively on his game and leave the logistics of his performance to others, while at the same time providing a forum to demonstrate his skills and attract third party endorsement," Resp. Br. 30-31; *see also* NAPAS Br. 17, these supposed "goods and services" are not goods and services provided to the public, but ancillary benefits that are extended as part and parcel of the working relationship between the Tour and its players. Far from being offered to "clients or customers," they are granted in exchange for the commitment of those golfers who play on the Tour.[6]

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[5] Even though several *amici* point to the fact that respondent does not earn a *guaranteed* income from the Tour, *see* US Br. 19; NAPAS Br. 17, that fact does not show that the relationship between respondent and the Tour is not a working one. Many persons working at public accommodations earn money that is contingent on performance, including insurance agents (commissions) and tennis or golf instructors (lesson fees).

[6] The United States also argues that respondent is not really an independent contractor because the Tour has "no right to select or reject golfers," choosing to rely instead on the results of a qualifying competition. US Br. 19. But the fact is that the Tour does "select and reject" golfers; it simply does so based on an objective, rather than subjective, criterion:

In this respect, respondent is in the same situation as many persons working at places of public accommodation. An independent contractor lecturing at a private university, for example, is given, among other things, the opportunity to associate with distinguished academics, to meet with students at prearranged times and places, to demonstrate his skills to interested observers, and to gain visibility within his profession, but it would be fanciful to say that, as a consequence, he is properly regarded as a member of the public partaking of goods and services offered by the university. On the contrary, a university lecturer is helping to provide educational services to university students (who *are* clients and customers of the university) and, while he may receive incidental benefits in addition to payment for his labor, those benefits are truly incidental—that is, they are a direct consequence of, and inseparable from, his agreement to work for the university. He remains in the capacity of a person working for the operator of a place of public accommodation, and his complaints about the terms and conditions established for working there are not cognizable under Title III.

The Act thus does not support the claims made by respondent. As an independent contractor, respondent cannot obtain redress under Title I, and, as a person working for the operator of a place of public accommodation, he cannot bring his claim under Title III. Those grounds are sufficient to deny him relief.

II. REQUIRING SELECTIVE WAIVER OR ELIMINATION OF OUTCOME-AFFECTING RULES WOULD FUNDAMENTALLY ALTER TOUR EVENTS

Even if Title III does provide a basis for the claim asserted by respondent, it does not require the Tour to waive or eliminate its legitimate competitive rules. Although the courts below thought

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performance in a designated tournament. Having paid an entry fee to defray expenses, the players compete for the right to perform as part of the Tour.

otherwise, neither the court of appeals nor the district court ever undertook the necessary inquiry into the basic nature of the highest-level Tour competitions, which depend upon the expectation that all competitors will play according to a uniform set of substantive (*i.e.*, potentially outcome-affecting) rules. Totally disregarding the need for uniformity, the Ninth Circuit instead ordered the Tour to offer a *different* competition, allowing one competitor to play without observing a substantive rule that has been part of the relevant Tour competitions from their inception. This lack of respect for uniform rules—the understood basis of competition in every professional sport—truly works a fundamental alteration of Tour events. *See Olinger v. United States Golf Ass'n*, 205 F.3d 1001, 1006 (7th Cir. 2000); 42 U.S.C. § 12182(b)(2)(A)(ii).

The briefs filed by respondent and his *amici* show a similar inattention to the importance of uniform rules. Although they talk at length about the "walking rule" itself, they say almost nothing about the fact that adherence to uniform competitive rules is at the core of elite sports competitions in general, and of the relevant Tour events in particular. Indeed, to suggest that professional athletes may deviate from the rules applicable to other competitors, they largely rely on two isolated examples, neither of which is in the record and both of which appear to be inaccurate. *See* Resp. Br. 49-50.[7] Otherwise, they just point to recreational sports or less exacting types of sports competitions. As the briefs filed by *amici* USGA, ATP, and LPGA make

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[7] Nothing in this record demonstrates that either professional baseball or professional football allowed one competitor to disregard a rule applicable to other players. So far as we can tell, the rules of professional baseball appear to allow all pitchers to do what Jim Abbott was doing (*i.e.*, spin the ball during his delivery) so long as it does not deceive a baserunner, and respondent cites no rule of professional football with respect to the shoe worn by Tom Dempsey. Moreover, there is no evidence that the rules of professional baseball or football were waived or altered in those instances; at most, it appears, officials determined that the actions of those particular players did not violate any relevant rules.

clear, however, the essence of competitive athletics at the highest level is that all players, without exception, must perform according to a uniform set of rules. *See* USGA Br. 19-28; ATP/LPGA Br. 4-12.

To the extent that respondent and his *amici* address the Tour competitions at issue here, their arguments for dispensing with uniformity are equally baseless. For example, although respondent relies on various other events conducted by the Tour without a walking requirement, Resp. Br. 36-37, the existence of those tournaments demonstrates not that rules can vary from player to player—all players are subject to identical rules—but that some golf competitions can be played under less difficult standards. Those tournaments are simply a different kind of competition. With respect to the tournaments that respondent seeks to enter (the competitions actually in question), neither respondent nor any *amicus* can identify a single tournament put on by the Tour that has allowed selected players to play without observing the full set of substantive rules applicable to other golfers. At most, respondent notes that Tour officials have occasionally permitted players (*all* players) to be shuttled for short distances, Resp. Br. 36, when, for example, there is an unusual course configuration (*e.g.*, where parts of the course are widely separated) or there is a threat to players' safety (*e.g.* the need to cross streets). The district court expressly found, however, that "[n]o waiver [of the "walking rule"] has ever been granted for individualized circumstances (such as disability)." J.A. 64. In short, the history of the highest-level Tour events shows consistent adherence to the importance of uniform rules.

This background demonstrates that it would fundamentally alter Tour competitions for one player to be excused from compliance with a particular substantive rule. Although the Act does not define the term "fundamentally alter," the specific regulations addressing the term—cited in our brief, Pet. Br. 32, but ignored by respondent and his *amici* (including the United States)—make clear that Title III does not compel an organization to make changes that would force it to depart from

its "normal course of business." *See* 28 C.F.R. ch.1, pt. 36, App. B, at 641. Thus, for example, a bookstore need not carry books that it does not otherwise carry, and a physician need not modify the medical services offered to his or her patients. *Id.* Those examples fit the present case: it is hard to imagine anything further from the "normal course of business" of Tour events than a requirement that the Tour vary its substantive rules according to the physical limitations of various competitors. To do so, in fact, would make it impossible for the Tour to do what it has traditionally done: to measure and compare competitive golfing performances by testing all players under the same standards.

Perhaps recognizing that the case for dispensing with uniformity is dubious, some *amici* offer their own solution: to have the Tour eliminate the "walking rule" for all competitors. *See* NAPAS Br. 21. But this is just fundamental alteration of a different stripe. It would no more be within "the normal course of business" for the Tour to conduct its highest-level events without a walking requirement than it would be to conduct them with different rules for different players. The highest-level Tour competitions have always had a walking requirement, for the very reason that it makes those particular competitions more demanding. J.A. 258-59. A golf tournament without walking is, once again, a different kind of competition.

The NAPAS suggestion, while failing to solve the "fundamental alteration" problem, does illuminate an important part of the dispute here. At bottom, its argument (like the argument of other *amici*, *see*, *e.g.*, Dole Br. 26-29) rests upon a basic proposition: that professional sports organizations can be required to modify any substantive rule that puts disabled athletes at a disadvantage *unless* the governing organization is able to establish that the rule is, by some standard or other, "fundamental" to the game. But this theory, which was largely adopted by the Ninth Circuit (J.A. 44-45), assumes that it is possible to change the substantive rules of a competition, either

by selective waiver or elimination, without fundamentally altering the nature of the particular competition itself. In our view, that assumption is simply incorrect. A professional sport is, by definition, a contest conducted under specified substantive rules—that is, rules that are designed to, and do, potentially affect the outcome of the contest—and a rule properly found to be substantive thus cannot be set aside without turning the defined competition into a different competition. In its decision below, the Ninth Circuit simply changed what Tour rules require competitors to do.

The attempt to carve out a category of waivable "non-fundamental" rules is disturbing in other respects as well. In particular, it is inconsistent with the understanding, acknowledged by this Court in the antitrust context, that sports organizations have (and, indeed, must have) broad latitude "to create and define the competition." *NCAA v. Bd. of Regents*, 468 U.S. 85, 101 (1984). This latitude is accorded not because competitive sports occupy some preferred place in society, but because substantive rules established by sports organizations are, by their very nature, less susceptible to reasoned second-guessing than the policies and practices of other organizations. That is especially so in the present context because the substantive rules of a sport are meant to set up tests of physical ability, a purpose that does not readily lend itself to waivers based on physical disabilities. *See* Pet. Br. 33-34, 36. Moreover, as the NAPAS brief correctly points out, the substantive rules defining a particular athletic competition, unlike most other kinds of business requirements, "are not means to an end; they are an end in themselves." NAPAS Br. 24. Thus, for example, an Olympic weightlifting competition is designed and conducted in order to determine which competitor can lift the most weight, not to assess (as in the usual employment context) whether a particular person can lift enough weight to carry out the functions of a designated job. As a result, there is no objective standard for determining whether a specific requirement applicable to the competition—*e.g.*, that the

weightlifters perform their lifts from a prescribed position—is indispensable to the nature of the test.

We question, therefore, whether judges will be able to pick and choose among the multiple rules defining an athletic competition, approving some and disapproving others, based on nothing more than an individual assessment of the rules' importance to that competition. Even if (as the United States suggests) sports organizations ultimately will win most lawsuits challenging their right to apply competitive rules uniformly, *see* US Br. 28, the grounds for rational and consistent decision-making are nonetheless absent. Given that the competitive rules of any sport can be changed in theory—in tennis, for example, the net could be higher or lower, the court narrower or longer, the ball allowed to bounce twice—the "fundamental rule" approach would mean that the governing officials of a professional sport can never really define the nature of a particular competition but must ultimately depend on what judges think that the competition should be. The treatment of the rule at issue here is a prime example. The Seventh Circuit in *Olinger* held that walking was an integral part of the highest-level golf tournaments, and the Ninth Circuit held that it was not.

To state the obvious: the "walking rule" is no less fundamental to competitions in the Ninth Circuit than to competitions in the Seventh Circuit. The fact that different courts of appeals arrived at different conclusions with respect to the same rule strongly suggests that courts cannot reliably separate fundamental substantive rules (rules that may be enforced) from non-fundamental substantive rules (rules that must be waived or eliminated). As we have pointed out, Pet. Br. 36-37, the Ninth Circuit offered no standard for making that determination, and respondent and his *amici* likewise offer none. At best, they suggest or apply a variety of multi-part tests, weighing the rule at issue and the circumstances of each disabled athlete, all of which would leave the status of any given rule—whether in golf or other sports—wholly up in the air. *See, e.g.*, Resp. Br. 31-34; US Br. 24-30.

Even if these various tests could distinguish between fundamental and non-fundamental rules, however, they would provide no basis for a forced waiver of the "walking rule" in Tour competitions. Although respondent and his *amici* argue to the contrary, placing great reliance on the factual findings in this case, *see, e.g.*, Resp. Br.35-45; NAPAS Br. 26-30; US Br. 28-30, there is an air of unreality about all this emphasis, given the likelihood that the briefs would dispense with a similar endorsement of the *Olinger* findings. Furthermore, as we pointed out in our opening brief, Pet. Br. 36, the critical finding cited by the Ninth Circuit to show that walking is not important in the highest-level Tour events—that "the fatigue factor injected into the game of golf by walking the course cannot be deemed significant under normal circumstances" (J.A. 43) (internal quotation marks omitted)—necessarily, and notably, acknowledges that the "fatigue factor" *is significant* under certain circumstances (and may play some lesser role at other times). Rather than deal with the point directly, respondent has now relegated this finding to a footnote in his argument, Resp. Br. 41 n.22, while continuing to make assertions as though the finding said that fatigue never had any effect at all. *See* Resp. Br. 39 (discussing "[t]he most compelling evidence that walking during competitive golf does not induce fatigue"). (A group of *amici* does acknowledge the nature of the finding, though wishfully characterizing it as "ambiguous." NAPAS Br. 28.) The finding stands on its own merits, however, and it stands, at the very least, for the proposition that the walking requirement can significantly affect performance in Tour events.

This finding thus takes care of the multiple arguments based upon the premise that golf is really all about shotmaking. *See* Resp. Br. 35. We do not dispute, of course, that shotmaking is the *sine qua non* of golf at all competitive levels—from beginning golfers to those qualified to play on the PGA Tour—but the important point is that shotmaking is a skill tested in different ways at different levels. Unlike recreational golf, or less rigorous professional events, the highest-level Tour events

require that shots be executed under the most demanding conditions, including the fatigue induced by walking the golf course over four days. That makes the test different from the test set for golfers in other competitions. Because golf is a game of precision, even small changes resulting from fatigue can affect the ability of professional golfers to make difficult shots. J.A. 174-78; 189-91. And, because the difference in relative scores among golfers is slight, even minor changes in shotmaking ability can mean the difference between success and failure on the Tour. *See* Pet. Br. 36 n.25, 37-38. To alter any rule affecting shotmaking thus leads to a fundamental alteration of the competition.

Finally, to demonstrate that Tour competitions are not really changed by the waiver granted below, respondent and his *amici* rely on a finding that respondent, by virtue of his disability, endures as much fatigue in walking part of the course as "able-bodied" golfers do in walking all of the course. *See, e.g.*, Resp. Br. 44-45; US Br. 29. But this finding, even if thought correct, is beside the point.[8] The PGA Tour is not seeking to inject some fixed level of fatigue into its competitions, regardless of the source; it is seeking to inject whatever fatigue each individual player may happen to experience from having to perform the same assigned task (*i.e.*, walking the entire golf course during the entire tournament). It is presumably true that certain golfers are subject to heightened levels of fatigue because of disabilities (as defined in the Act) or because of other conditions such as painful back ailments, diabetes, or

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[8] As we discussed in our opening brief, there is no reliable way to make this determination. *See* Pet. Br. 39-41. Furthermore, the most likely evidence of possible competitive advantage would arise out of a comparison between respondent and other golfers with physical infirmities (if not disabilities), who feel the greatest effects from the inability to use a cart. *See* USGA Br. 23 n. 8 (discussing competition in which respondent with a cart defeated an injured golfer without one). The courts below, with their comparison to a hypothetical "able-bodied" golfer, did not make any such inquiry.

allergies, but it would change Tour events dramatically if players could lay claim to the use of a golf cart for some or all of a tournament on the ground that they will still endure the same amount of fatigue as able-bodied competitors will endure by the end of the tournament. That is simply changing the nature of the test.

There is thus no basis in Title III for the Ninth Circuit to insist that the Tour must redefine the nature of its highest-level competitions, either by granting selective waivers of the "walking rule" or by eliminating it completely. The Act does not require the Tour to accommodate disabled athletes by allowing them to play a different game.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

PGA TOUR, INC., PETITIONER

v.

CASEY MARTIN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. 12181 to 12189 (1994 & Supp. IV 1998), regulates standards for competitors in athletic competitions held at places of public accommodation.

2. Whether Title III may require a professional sports organization to accommodate a disabled competitor by waiving a rule of athletic competition.

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INTEREST OF THE UNITED STATES

This case presents important questions concerning the application of Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. 12181 to 12189 (1994 & Supp. IV 1998), to athletic competitions held at places of public accommodation. Pursuant to 42 U.S.C. 12186(b), the Department of Justice has promulgated regulations that implement Title III's provisions, see 28 C.F.R. Pt. 36. The Attorney General also has substantial enforcement responsibilities under Title III. 42 U.S.C. 12188(b). This Court's decision on the scope of Title III's coverage and its construction of the "fundamental alteration" defense in the context of competitive events could have a significant impact on the Department's ability to enforce Title III's protections.

STATEMENT

1. The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.*, establishes a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress specifically found that discrimination against persons with disabilities "persists in such critical areas as * * * public accommodations * * * [and] recreation." 42 U.S.C. 12101(a)(3).

Title III of the Act mandates that:

> [n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. 12182(a). Congress identified twelve broad categories of "public accommodation[s]" covered by Title III, including "a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment"; an

"auditorium, convention center, lecture hall, or other place of public gathering"; and a "gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation." 42 U.S.C. 12181(7)(C), (D) and (L).[1] Congress then identified specific conduct that would violate the general prohibition against discrimination, including

> a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.

42 U.S.C. 12182(b)(2)(A)(ii).

2. Petitioner is a non-profit association of professional golfers organized "to promote and operate tournaments for the economic benefit of its members." Pet. App. 46a. Petitioner sponsors three golf tours. Its most elite competition is the PGA Tour, followed by the Nike Tour, and the Senior Tour for golfers over age 50. *Id.* at 2a. Petitioner leases and operates golf courses across the country for its competitions. *Ibid.* The primary means of gaining entry to the PGA and Nike Tours is to compete in petitioner's three-stage qualifying school tournament. The competition is open to any member of the public who pays the entry fee and submits two letters of reference. *Id.* at 41a-42a.

Respondent is a professional golfer who has a circulatory disorder in his right leg that makes it medically necessary for him to use a golf cart rather than walk the golf course. Pet. App. 2a, 18a. In 1997, respondent competed successfully in the first two rounds of petitioner's qualifying school

[1] Title III exempts from its coverage certain public accommodations controlled by religious organizations and private clubs. 42 U.S.C. 12187.

tournament and advanced to the final round. That same year, petitioner abandoned its historic practice of permitting golf-cart usage in the final round of its tournament, J.A. 267, and refused to make an exception for respondent, Pet. App. 3a.

Respondent filed suit under Title III of the Disabilities Act seeking an injunction requiring petitioner to permit him to use a golf cart during competitions. J.A. 97. The district court granted partial summary judgment for respondent, Pet. App. 41a-55a, holding that petitioner operates a place of "public accommodation" at the golf courses at which it conducts its tournaments. *Id.* at 51a-55a. Following a bench trial, the district court ruled that petitioner's failure to modify its walking rule to accommodate respondent's disability violated Title III. Pet. App. 16a-40a. Accepting petitioner's assertion that the walking rule is designed "to inject the element of fatigue into the skill of shot-making," *id.* at 32a, the court concluded that the fatigue caused by walking "cannot be deemed significant under normal circumstances," *id.* at 33a, and that permitting respondent to use a cart would not give him a competitive advantage because "[t]he fatigue [respondent] endures just from coping with his disability is undeniably greater than the fatigue injected into tournament play on the able-bodied by the requirement that they walk from shot to shot," *id.* at 35a.

3. The court of appeals affirmed. Pet. App. 1a-15a. The court held that the golf courses remain places of public accommodation during petitioner's tournaments, *id.* at 4a-8a, reasoning that the "fact that users of a facility are highly selected does not mean that the facility cannot be a public accommodation," especially where "[a]ny member of the public" who pays the entry fee and supplies letters of recommendation may compete, *id.* at 7a. The court also ruled that permitting respondent to use a cart was a "reasonable" modification, which did not "fundamentally alter the nature of the PGA and Nike Tour tournaments," *id.* at 8a-15a,

because permitting respondent to use a cart would not give him an advantage over other golfers in "[t]he central competition [of] shot-making," *id.* at 10-11.

SUMMARY OF ARGUMENT

1. Petitioner's operation of golf courses during its tournaments falls squarely within Title III's compass. Title III expressly identifies "golf courses," places of "exercise," and "any place of exhibition or entertainment," as "public accommodations" subject to Title III's terms. Petitioner's suggestion that only spectators at such venues enjoy Title III's protections cannot be reconciled with that straightforward statutory text. Furthermore, Congress's express purpose to afford individuals with disabilities comprehensive protection against discrimination and to promote social and economic integration foreclose the unnaturally narrow construction of that language that petitioner proposes.

The legislative history and consistent regulatory interpretation confirm that Congress meant exactly what it said. Discrimination in access to athletic services and facilities, not just for spectators but also for participants, was one of the problems considered by Congress. Congress also specifically addressed the application of the Disabilities Act to rules imposed by professional sports organizations on their athletes. Further, the Department of Justice's implementing regulations, technical guidance, and enforcement activities have long interpreted and applied Title III as pertaining to competitive athletics.

Finally, petitioner's arguments that respondent is denied protection under the Disabilities Act because respondent is an independent contractor, rather than a "client or customer" of petitioner, fail. The assumption that respondent is an "independent contractor" and not a "client" is dubious, and petitioner's independent contractor argument ignores the statutory text, structure, and relevant administrative interpretations. Likewise, the contention that Title III

protects only an economic marketplace of "clients and customers" lacks any viable anchor in the statutory text and is foreclosed by legislative history and rudimentary principles of statutory construction.

2. The district court and court of appeals appropriately considered the relevant factors in concluding that a waiver of petitioner's walking rule would not fundamentally alter its competitions. The courts below found that no written rules or other documentation supported the claim that the game of competitive golf is intended to measure walking endurance, rather than shot-making skills. Furthermore, given respondent's disability, use of a cart would afford him no competitive advantage; indeed, most golfers prefer to walk for tactical reasons. Finally, numerous exceptions already are made to the walking rule both by other competitive golfing organizations and by petitioner, including exceptions for when balls are lost or long distances separate holes. Given that record, the courts below reasonably concluded that, if petitioner can accommodate players who lose their golf balls, it can equally accommodate respondent's disability.

ARGUMENT

I. THE GOLF COURSES ON WHICH PETITIONER CONDUCTS ITS COMPETITIONS ARE PUBLIC ACCOMMODATIONS SUBJECT TO TITLE III OF THE AMERICANS WITH DISABILITIES ACT

A. Petitioner's Golf Course Operations Fall Squarely Within The Language Of Title III

The plain text of Title III encompasses petitioner's tournaments conducted at golf courses. Title III broadly prohibits (1) "any person who owns, leases (or leases to), or operates" (2) a "place of public accommodation" from discriminating against an individual on the basis of that individual's disability (3) in the provision of "goods, services, facilities, privileges, advantages, or accommodations." 42

U.S.C. 12182(a). First, the district court and court of appeals found (Pet. App. 2a, 51a), and petitioner does not dispute, that it is a private entity (42 U.S.C. 12181(6)) that "leases" and "operates" golf courses during its tournaments.[2]

Second, the golf courses on which petitioner conducts its tournaments are "place[s] of public accommodation." Title III expressly lists a "golf course, or other place of exercise or recreation" as a covered public accommodation. 42 U.S.C. 12181(7)(L). Moreover, during competitions, the golf course also operates as a covered "place of exhibition or entertainment," 42 U.S.C. 12181(7)(C), in the same manner as a sports stadium or concert hall. See also Pet. Br. 10 ("The PGA TOUR is 'part of the entertainment industry.'").

Third, the opportunity to compete in petitioner's tournaments for prize money and professional advancement is a "good," "service," "privilege," or "advantage" offered by the public accommodation, just as the opportunity to take college-admission tests and bar examinations, or to compete in a beauty pageant or casino night may be offered by an auditorium or other "place of public gathering" (42 U.S.C. 12181(7)(D)).

That straightforward reading of Title III's text comports with Congress's express findings and purpose in enacting the Disabilities Act. Congress intended that the Disabilities Act's coverage be "comprehensive," 42 U.S.C. 12101(b)(1), and ensure that individuals with disabilities enjoy "full participation" in society, rather than continue to be relegated to "lesser * * * programs [and] activities," 42 U.S.C. 12101(a)(5) and(8).

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[2] That petitioner's operation of the courses is temporary does not relieve it of its obligations under Title III. See 28 C.F.R. Pt. 36, App. B, at 629 (definition of covered persons "is quite extensive" and applies "even if the operation is only for a short time"); see also Dep't of Justice, *The Americans with Disabilities Act: Title III Technical Assistance Manual* 3 (Nov. 1993) (*Manual*).

Petitioner contends (Br. 22-23) that Title III's coverage of golf courses, stadiums, concert halls, and similar places is limited to the spectators who attend events at those locations. The short answer is that Title III's text contains no such qualification. To the contrary, the description of golf courses as places of "exercise" is most naturally read to refer to the playing course itself and not the gallery. Furthermore, the coverage of golf courses, stadiums, and concert halls is unqualified; if Congress wished to limit Title III's coverage to spectators, it could have said "the seating area of" or "the viewing area of" those facilities. But Congress did not. The Disabilities Act thus "plainly covers" golf courses, as facilities for recreation and for exhibition and entertainment, "*without* any exception that could cast the coverage of [petitioner] into doubt." *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 209 (1998).

B. The Legislative History Of The Disabilities Act Supports Its Application To The Playing Field For Competitive Athletics

The legislative history confirms what Title III's plain language says. "[B]ecause discrimination against people with disabilities is not limited to specific categories of public accommodations," S. Rep. No. 116, 101st Cong., 1st Sess. 11 (1989), Congress deliberately crafted a broad definition of public accommodations to provide "people with disabilities the opportunity to compete on an equal basis," 42 U.S.C. 12101(a)(9), and to ensure "access to all aspects of society," S. Rep. No. 116, *supra*, at 11. See also *id.* at 59 (definition of public accommodation "should be construed liberally"); H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 35, 100 (1990). In particular, the Committee Reports left no doubt that coverage of sport facilities was intended to extend to the playing field. Both the House and Senate Reports specifically identify "driving ranges," "[t]ennis *courts*," and "basketball *courts*" as covered facilities. S. Rep. No. 116, *supra*, at 59

(emphasis added); H.R. Rep. No. 485, *supra*, Pt. 2, at 100 (emphasis added).

Title III's expansive coverage was the product of extensive congressional hearings at which persons with disabilities voiced their objections to exclusion from, among other things, participation in athletic events. One witness described the discriminatory exclusion of mentally retarded children from Little League baseball. See 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legislative History of Pub. L. No. 101-336: The Americans with Disabilities Act* 1058 (Comm. Print 1990) (*Leg. Hist.*). Another witness explained: "Competitive sports activities provide people with disabilities the opportunity to prove what we can do. Too often we are told that we cannot compete effectively in all aspects of life. We Can!" 3 *Leg. Hist.* 3077.[3]

Nor did Congress intend to limit coverage to amateur or recreational athletics. Congress specifically considered the implications of the Disabilities Act for drug-testing programs conducted by "professional sports leagues" (136 Cong. Rec. 17,373 (1990) (Sen. Hatch)):

> [T]he conferees recognize that professional sports organizations have promulgated policies to deter and treat

[3] See also 2 *Leg. Hist.* 943 ("When people don't see the disabled among our co-workers, or on the bus, or at the sports field * * *, most Americans think it's because *they can't*. It's time to break this myth. The real reason people don't see the disabled among their co-workers, or on the bus, or at the sports field * * * is because of barriers and discrimination. Nothing more."); 3 *Leg. Hist.* 2143 (discrimination prevents persons with disabilities from "participating in * * * sports"); 136 Cong. Rec. 11,453 (1990) (Rep. Morrison) ("[A]t one time, it was unheard of for individuals using wheelchairs to play tennis, and tennis court designers and managers never contemplated disabled players wanting courts. * * * [T]ennis courts should be wheelchair accessible."); 136 Cong. Rec. 11,437 (1990) (Sen. Simon) ("Through the visibility of athletics, the University of Illinois and other schools are demonstrating the capabilities of underused citizens.").

> substance abuse among athletes. * * * The House Committee on Education and Labor reviewed the policies in light of this legislation and found that the policies are entirely consistent with the non-discrimination provisions of the bill.

Ibid. (Sen. Harkin).[4] The Conference Report then stressed that "[t]he Act is not intended to disturb the legitimate and reasonable disciplinary rules and procedures established and enforced by professional sports leagues." H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 66 (1990). None of that discussion would have been necessary if Congress did not intend the Disabilities Act to regulate the standards established for competitors by professional sports organizations.

C. The Administrative Interpretation, Implementation, And Enforcement Of The Disabilities Act Reinforce The Act's Coverage Of Competitive Athletics

The Justice Department's consistent interpretation and implementation of Title III removes any remaining doubt that Title III's coverage extends "inside the ropes" (Pet. Br. 22) to competitive athletics and other performers in places of public accommodation. In the Disabilities Act, Congress expressly assigned responsibility to the Attorney General to issue regulations to carry out the provisions of Title III, 42 U.S.C. 12188(b), and to assist the public in complying with Title III's obligations through, among other things, the publication of a "technical assistance manual," 42 U.S.C. 12206(c)(2)(C) and (3). The Disabilities Act further charges the Architectural and Transportation Barriers Compliance

[4] See also 136 Cong. Rec. E1915 (daily ed. June 13, 1990) (Rep. Hoyer) ("The Committee has reviewed these policies because the leagues have raised questions as to whether such policies comply with the act."); see also *id.* at E1915-E1916 (specifically discussing programs run by the National Football League, the National Basketball Association, Major League Baseball, and the National Hockey League).

Board (Access Board) with promulgating minimum guidelines for making "buildings, facilities, rail passenger cars, and vehicles" accessible "in terms of architecture and design, transportation, and communication." 42 U.S.C. 12204(b); see also 42 U.S.C. 12186(c).[5]

Pursuant to its statutory authority, the Department of Justice has promulgated standards governing the accessibility of stadiums. See Dep't of Justice, *Accessible Stadiums* (1996). That publication emphasizes that the Disabilities Act's accessibility requirements extend beyond the spectator areas. "An accessible route must connect the wheelchair seating locations with the stage(s), performing areas, arena or stadium floor, dressing or locker rooms, and other spaces used by performers." *Id.* at 2.[6] The purpose of such accessible routes is to "provide[] access for the public, employees, and athletes using the facility." *Id.* at 3.

The Justice Department's Standards for Accessible Design likewise direct that facilities used for public performances (such as assembly halls or theaters) must "provide an accessible route to a performing area," not just to spectator seats. 28 C.F.R. Pt. 36, App. A, at 534.[7] Indeed, Congress effectively required such coverage. The Disabilities Act

[5] The Access Board is a federal agency created by the Rehabilitation Act of 1973, 29 U.S.C. 792(a) (1994 & Supp. IV 1998).

[6] See also *Accessible Stadiums*, *supra*, at 3 (stadiums must be designed so that an "accessible route * * * provide[s] access to all public and common use areas including the playing field, locker rooms, dugouts, stages, swimming pools, and warm-up areas"); *id.* at 4 (identifying "public and common use areas" subject to the Disabilities Act as including "locker rooms").

[7] See also 28 C.F.R. Pt. 36, App. A, at 583-585; *id.* at 585 ("An accessible route shall connect wheelchair seating locations with performing areas, including stages, arena floors, dressing rooms, locker rooms, and other spaces used by performers."); *id.* App. B, at 640 ("It would violate this section to establish exclusive or segregative eligibility criteria that would bar, for example, all persons who are deaf from playing on a golf course."); *Manual* 15 (basketball league may exclude wheelchair player only if it "can demonstrate that the exclusion is necessary for safe operation").

mandates that the Department's regulations be "consistent with the minimum guidelines and requirements" of the Access Board, 42 U.S.C. 12186(c), which in turn are required to "supplement the existing Minimum Guidelines and Requirements for Accessible Design," 42 U.S.C. 12204(a), promulgated under the Rehabilitation Act and in existence at the time the Disabilities Act was passed. Those pre-existing guidelines required the provision of accessible routes to "performing areas, including but not limited to stages, arena floors, dressing rooms, locker rooms, and other rooms and spaces required for use of the assembly area." 36 C.F.R. 1190.31(s)(3) (1989).[8]

The Access Board likewise includes the playing area of athletic facilities, and not just the stands, in proposed guidance that it has issued. See 64 Fed. Reg. 37,326, 37,336, 37,343, 37,350 (1999) (addressing accessibility in golf courses and sports facilities in the actual "area of sport activity," and accessible routes to player areas, as well as spectator areas).[9]

[8] The Department of Justice also bears investigation and enforcement responsibilities under Title III. 42 U.S.C. 12188(b). Those enforcement efforts similarly reflect the Act's intended coverage of competitive athletics. See, *e.g.*, Three Settlement Agreements Between the United States and the Atlanta Committee for the Olympic Games, et al., Concerning the Olympic Stadium, the Olympic Aquatic Center, and the Olympic Tennis Center (1996) (providing accessibility for spectators, competitors, and support personnel), available at http://www.usdoj.gov/crt/ada/settlement.htm; Consent Decree between the United States and the NCAA, Civil No. 98-1290 (D.D.C. May 27, 1998) (addressing discrimination in initial eligibility requirements against students with learning disabilities); Settlement Agreement Between the United States and the Southeastern Conference (Dep't of Justice Complaint No. 202-35-103) (1999) (same); Letter from Deval Patrick, Asst. Attorney General, to Allan Selig, Acting Commissioner of Major League Baseball (Oct. 22, 1996), concerning the accessibility of new major and minor league sports facilities, including team locker rooms and similar areas, available at http://www.usdoj.gov/crt/foia/cltr196.txt.

[9] See also 65 Fed. Reg. 45,331 (2000); Recreation Access Advisory Comm., *Recommendations for Accessibility Guidelines: Recreational Facilities and Outdoor Developed Areas* 1, 2-7 (July 1994) (summary

Because the Justice Department's implementing regulations, technical assistance publications, and enforcement activities have consistently acknowledged and enforced the Disabilities Act's coverage of the playing areas for competitive athletics, "the Department's views are entitled to deference." *Bragdon* v. *Abbott*, 524 U.S. 624, 646 (1998).[10]

D. Analogous Civil Rights Legislation Applies To Competitive Athletics

Congress's coverage of competitive athletics under analogous civil rights laws evidences Title III's similarly broad scope. Congress modeled Title III of the Disabilities Act on Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a *et seq.*.[11] Although the Civil Rights Act's definition of covered

printed at 59 Fed. Reg. 48,542 (1994)) (recommending that "all new sports facilities can and should be designed to be usable by persons with disabilities," and detailing the provision of access to the "field-of-play" for golf and other sports, dugouts, locker rooms, and other "performing areas"). The Access Board expects to finalize the guidelines in 2001.

[10] A number of courts also have applied the Disabilities Act's provisions to competitive athletics. See, *e.g.*, *Washington* v. *Indiana High Sch. Athletic Ass'n*, 181 F.3d 840 (7th Cir.) (Title II applied to high school eligibility requirements), cert. denied, 120 S. Ct. 579 (1999); *McPherson* v. *Michigan High Sch. Athletic Ass'n*, 119 F.3d 453 (6th Cir. 1997) (en banc) (same for Title III); *Pottgen* v. *Missouri State High Sch. Activities Ass'n*, 40 F.3d 926 (8th Cir. 1994) (same for Title II); *Bowers* v. *NCAA*, 118 F. Supp. 2d 494 (D.N.J. 2000) (Title III); *Tatum* v. *NCAA*, 992 F. Supp. 1114 (E.D. Mo. 1998) (Title III); *Shultz* v. *Hemet Youth Pony League*, 943 F. Supp. 1222 (C.D. Cal. 1996) (Title III); *Ganden* v. *NCAA*, No. 96-C-6953, 1996 WL 680000 (N.D. Ill. Nov. 21, 1996) (Title III); *Butler* v. *NCAA*, No. C96-1656L, 1996 WL 1058233 (W.D. Wash. Nov. 8, 1996) (Title III); *Anderson* v. *Little League Baseball*, 794 F. Supp. 342 (D. Ariz. 1992) (Title III protects coaches).

[11] That statute provides, in relevant part:

> All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

42 U.S.C. 2000a(a).

public accommodations is narrower than the Disabilities Act's definition, see 42 U.S.C. 2000a(b), courts nevertheless have held that Title II of the Civil Rights Act encompasses the right to participate in, rather than just to observe, athletic events. In *Daniel* v. *Paul*, 395 U.S. 298 (1969), this Court found "no support in the legislative history" for the contention that Title II of the Civil Rights Act "refers only to establishments where patrons are entertained as spectators or listeners rather than those where entertainment takes the form of direct participation in some sport or activity." *Id.* at 306.

More particularly, courts have held that competitive athletic events conducted by sports associations (including golf associations) constitute places of public accommodation subject to Title II of the 1964 Civil Rights Act. See *United States* v. *Slidell Youth Football Ass'n*, 387 F. Supp. 474, 482-483 (E.D. La. 1974) (association of coaches and football players is a public accommodation in its operation of a youth football league); *Wesley* v. *City of Savannah*, 294 F. Supp. 698, 702-703 (S.D. Ga. 1969) (golf tournament is a place of public accommodation).[12] Because the Disabilities Act's coverage of public accommodations is more extensive than that of the 1964 Civil Rights Act, see S. Rep. No. 116, *supra*, at 11; H.R. Rep. No. 485, *supra*, Pt. 2, at 35, petitioner has no more license to exclude players on the basis of disability than to exclude Tiger Woods or Vijay Singh on the basis of race.

[12] See *Welsh* v. *Boy Scouts of America*, 993 F.2d 1267, 1272 (7th Cir.) (a membership organization is a place of public accommodation when it "functions as a 'ticket' to admission to a facility or location," such as a sports field), cert. denied, 510 U.S. 1012 (1993); *Miller* v. *Amusement Enters., Inc.*, 394 F.2d 342, 350 (5th Cir. 1968) (en banc) (Title II covers "establishments which provide recreational or other activities for the amusement or enjoyment of its patrons"); *Evans* v. *Laurel Links, Inc.*, 261 F. Supp. 474, 475- 477 (E.D. Va. 1966) (Title II guarantees equal right to play golf on golf course).

Likewise, the Rehabilitation Act of 1973 applies to competitive athletic events operated by recipients of federal financial assistance. See 34 C.F.R. 104.47(a) ("In providing physical education courses and athletics and similar programs and activities to any of its students," postsecondary institutions "to which this subpart applies may not discriminate on the basis of handicap.").[13] Because the Disabilities Act "requires [this Court] to construe the [Act] to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act," *Bragdon*, 524 U.S. at 632, Title III likewise must regulate competitive athletic standards.

E. Petitioner's Objections To Coverage Are Unavailing

1. Petitioner contends (Br. 22-23; Pet. 10) that its tournaments cannot fall within Title III's coverage because the general public is not allowed to participate; only golfers who have survived a highly competitive selection process are entitled to play. But Title III does not condition coverage on indiscriminate public access. Quite the opposite, the statutory text envisions coverage for numerous entities whose admission policies may be restricted. See 28 C.F.R. Pt. 36, App. A, at 530 (Title III applies to areas of "common use," which include areas "made available for the use of a restricted group of people").

First, many entities that are expressly identified as public accommodations are highly selective in nature. For example, private schools are covered despite the generally competitive nature of admission to elite schools. Theaters, concert halls, and stadiums are covered despite the fact that

[13] See also 34 C.F.R. 104.37(c) (same for preschool, elementary, and secondary institutions); 34 C.F.R. 104.47(a) (1989); *Kampmeier* v. *Nyquist*, 553 F.2d 296 (2d Cir. 1977) (junior high school athletics); *Cavallaro by Cavallaro* v. *Ambach*, 575 F. Supp. 171 (W.D.N.Y. 1983) (high school athletics); *Grube* v. *Bethlehem Area Sch. Dist.*, 550 F. Supp. 418 (E.D. Pa. 1982) (high school football); *Poole* v. *South Plainfield Bd. of Educ.*, 490 F. Supp. 948 (D.N.J. 1980) (high school wrestling).

they restrict access to ticket holders and, not infrequently, access to such tickets is highly competitive (*e.g.*, Redskins season tickets; popular rock concerts). Homeless shelters and food banks are covered despite the fact that they frequently restrict eligibility for their goods and services.[14]

Second, Title III's protection against discrimination in the allocation of "privileges" and "advantages" provided by places of public accommodation (42 U.S.C. 12182(a)) demonstrates that coverage is not limited to activities open to all, because "privileges" and "advantages," by definition, are enjoyed by one person or group to the exclusion of others. See, *e.g.*, *Webster's Third New Int'l Dictionary* 30, 1805 (1986); see also *Menkowitz* v. *Pottstown Memorial Med. Ctr.*, 154 F.3d 113, 122 (3d Cir. 1998) (Title III applies to hospital staff privileges).

Third, the limited statutory exemption for genuinely private clubs, 42 U.S.C. 12187, demonstrates that Title III is not confined to activities open to the general public. Congress's deliberately narrow exemption for private clubs would be superfluous if any entity could avoid Title III's mandate simply by limiting public access in some identifiable way.

Fourth, as the private school and concert hall examples demonstrate, a public accommodation must be open to the public, not in the sense of imposing no eligibility requirements, but rather in the sense of openly permitting members of the public to compete for admission. Thus, while those who actually are admitted to and attend the Nation's top

[14] See also *Independent Living Res.* v. *Oregon Arena Corp.*, 982 F. Supp. 698, 759 (D. Or. 1997) (executive suites in a sports arena are places of public accommodation under Title III; "[A] facility that specializes in hosting wedding receptions and private parties may be open only to invitees of the bride and groom, yet it clearly qualifies as a public accommodation. Attendance at a political convention is strictly controlled, yet the convention center is still a place of public accommodation.") (citation omitted).

private universities may reflect a small cross-section of society, those universities generally allow any member of the public who submits an application, references, and the required fee to participate in the competition for admission. Further, their admission process is based largely on objective indicators of performance, rather than the types of insular and associational values that are the hallmark of private clubs. Competition for concert or stadium tickets is likewise generally open to the public and decided based upon objectively measurable criteria. Petitioner's tournaments are no different. While the tournaments themselves include only a narrow group of participants, petitioner permits any member of the public who submits the required fee and application papers to compete for the opportunity to play in its tournaments.[15]

2. Petitioner argues (Br. 16-19) that coverage of its tournaments would be inconsistent with Title I of the Disabilities Act's implied exclusion of independent contractors from its employment-discrimination provisions. That argument fails for three reasons.

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[15] Cf. *Runyon* v. *McCrary*, 427 U.S. 160, 172 n.10 (1976) (private schools are considered open to the public because "[t]heir actual and potential constituency * * * is more public than private" in that "[t]hey appeal to the parents of all children in the area who can meet their academic and other admission requirements"). Petitioner's (Br. 18, 23, 32) and its amici's reliance (USGA Br. 13; ATP Br. 13) on regulatory provisions that identify hybrid private and public facilities is misplaced. For the most part, those regulations address the opposite situation—when select portions of facilities that are not otherwise covered by Title III may be open to the public for a limited purpose. For such private entities, Title III's coverage pertains only to those portions of their operations that constitute a public accommodation. See 28 C.F.R. Pt. 36, App. B, at 625 (where a commercial facility offers tours, only the tour route is a place of public accommodation); *id.* at 624 (for a "large hotel that has a separate residential apartment wing," the hotel would be covered while the residential wing would not). Petitioner's operation of a golf course for a tournament, where competition for entry or to observe play is open to the public, does not qualify as a commercial operation exempt from Title III, in whole or in part.

First, the very premise of petitioner's argument is mistaken. There is nothing inherently inconsistent about concluding that forms of discrimination excluded from coverage under one Title of the Disabilities Act are included in another. Rather, such coverage demonstrates the statute's breadth. See *Yeskey*, 524 U.S. at 212. Indeed, petitioner offers no basis for concluding that, in the course of crafting a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities" (42 U.S.C. 12101(b)(1)), Congress intended categorically to exclude such a large class of individuals from the Disabilities Act's aegis. The better reading of the Disabilities Act—and the only reading consistent with Congress's broad remedial purpose—is to conclude that the implicit exclusion of independent contractors from Title I reflects Congress's judgment that disputes over the independent provision of goods and services outside of an employee relationship are better dealt with through the provisions of Title II (for government contractors) and Title III (for private contractors).

Second, petitioner's argument lacks any basis in the Disabilities Act's text, legislative history, or administrative interpretation and implementation. Petitioner points to nothing in the language of any Title of the Disabilities Act that states that those engaged in contractual professional relationships are categorically excluded from protection under the Act's otherwise expansive coverage. Instead, petitioner asks this Court to hold that an *implicit* exclusion from one Title licenses disregard of claims that fall squarely within the text of another Title. But, as previously noted, the legislative history and administrative interpretation leave no doubt that Congress intended Title III's provisions to apply expansively to virtually everything that public accommodations offer to the public, including the opportunity to contract and including, in particular, the coverage of athletes and other performers.

Indeed, Title II—the public services counterpart to Title III—has long been understood to apply to those who enter into contracts with the government. See, *e.g.*, 28 C.F.R. 35.130(b)(5) ("A public entity, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability."); *Johnson* v. *City of Saline*, 151 F.3d 564, 570 (6th Cir. 1998).[16] Likewise, in *Menkowitz*, *supra*, the Third Circuit held, consistent with administrative guidance (*Manual* 22), that Title III applies to a private hospital's extension of staff privileges to doctors. 154 F.3d at 122-123.

Petitioner offers no explanation why Congress would afford contractors protection against discrimination by governmental entities, but not against the identical discrimination when practiced by a private place of public accommodation. See H.R. Rep. No. 485, *supra*, Pt. 2, at 84 (expressing intent that "the forms of discrimination prohibited by [Title II] be identical to those set out in the applicable provisions of titles I and III"). Indeed, such a construction would be especially anomalous given that one of Congress's primary motivations for enacting the Disabilities Act was to extend to private entities the protections already available against public agencies. See *id.* at 99; S. Rep. No. 116, *supra*, at 58.[17]

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[16] See also Dep't of Justice, *The Americans with Disabilities Act: Title II Technical Assistance Manual* § 3.7100, at 15 (Nov. 1993)) ("A public entity may not discriminate on the basis of disability in contracting for the purchase of goods and services.")

[17] See 135 Cong. Rec. 19,835-19,836 (1989) (Sen. Hatch) (Title III of the Disabilities Act applies to "all retail businesses, all service businesses, and more. From sole proprietorships all the way up, beyond 15-employee businesses. In contrast to the employment provisions, however, * * * [Title III] *contains no exemption whatsoever from its public accommodations provision.*") (emphasis added). Petitioner's concern that employers with less than 15 employees who are (unlike independent contractors) *expressly* excluded from coverage under Title I (see 42 U.S.C. 12111(5)(A)), will face claims of employment discrimination under Title III is misplaced. The legislative history makes clear that private employer/employee disputes can only be addressed under Title I and not under Title III. See H.R. Rep. No. 485, *supra*, Pt. 2, at 99 ("employment practices are governed by title I of this legislation," and not Title III); S. Rep. No. 116, *supra*, at 58 (same). In any event, because money damages are available under Title I but not under Title III, it is difficult to understand petitioner's argument (Pet. 19) that persons suing under Title III would somehow occupy a "*preferred* position."

Third, petitioner's effort to characterize respondent as an independent contractor is unpersuasive. A contractor, like an employee, is ordinarily paid for his work by the employer. Here, however, respondent initially paid petitioner $3000 for the privilege of participating in petitioner's tournaments. Moreover, respondent could play in petitioner's tournaments for an entire year without receiving any payment from petitioner. Tr. 815-816. And even when a player finally earns "prize money," more than half of his payment comes from someone other than petitioner, such as a corporate sponsor or tournament organizer. Tr. 819-820.

In addition, a contractor, like an employee, is ordinarily selected by the employer. But petitioner has no right to select or reject golfers because membership in the PGA or Nike Tour is open to anyone who finishes above a certain position in a qualifying tournament that is broadly opened to public participation. See Pet. App. 42a. Petitioner cannot pick and choose members from among the finalists. See *id.* at 49a; Tr. 473 ("[t]he competition picks" the players); Tr. 847 (petitioner does not "select" its members; admission rests entirely on performance).[18] Finally, an independent contractor, like an employee, commits to perform some work

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[18] Cf. *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 751 (1989) ("hiring" is essential to establish agency relationship for both employees and independent contractors); *O'Connor* v. *Davis*, 126 F.3d 112, 115 (2d Cir. 1997) (under the common law, "a prerequisite to considering whether an individual is" an employee or an independent contractor "is that the individual have been hired in the first instance"), cert. denied, 522 U.S. 1114 (1998).

pursuant to a contract.[19] Respondent, however, has no contract to provide any work or service for petitioner, and petitioner has absolutely no authority to require respondent to participate in any of its tournaments. Tr. 812. Tour members' participation is entirely within their discretion.

In short, there is no basis for concluding that the association between petitioner and respondent is the type of employment relationship that Congress intended to regulate either under Title I or not at all. To the contrary, the better understanding of their mutually beneficial professional relationship is that petitioner offers a service or privilege—the opportunity to compete for prizes—which respondent, like thousands of other members of the golfing public, wishes to enjoy.[20]

3. Petitioner seizes (Br. 19-23) upon the reference, in one subsection of Title III, to covered individuals as "clients or customers" of the public accommodation and, from that, concludes that Title III prohibits discrimination only in the "marketplace" (Br. 18). That cramped vision of Title III is without basis and, in any event, does not exclude respondent.

First, as a textual matter, the phrase petitioner invokes has no application to respondent's claim. Petitioner relies on the definition of covered individuals as "clients or customers" in 42 U.S.C. 12182(b)(1)(A)(iv), which provides:

> For purposes of clauses (i) through (iii) of this subparagraph, the term "individual or class of individuals" refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.

The reference in subsection (iv) to subsections (b)(1)(A)(i) through (iii) addresses the particular problem of preventing public accommodations from escaping their obligations under Title III by indirectly discriminating "through contractual, licensing, or other arrangements." 42 U.S.C. 12182 (b)(1)(A)(i)-(iii). The purpose of subsection (iv) was simply to clarify that, while public accommodations could not avoid Title III's mandates through contracts, neither would the existence of such a contractual relationship expand their responsibility to include any discrimination independently perpetrated by the other contracting party separate and apart from the underlying contract.[21] The "clients or customers" language thus was intended to elucidate the scope of contractual liability faced by places of public accommodation, not to transform Congress's broad mandate of public access into a narrow "marketplace" regulation. And the "clients or customers" limitation on contracts is not even implicated in this case, because the district court and court of appeals did not grant respondent relief under the provisions of 42 U.S.C. 12182(b)(1)(A) that prohibit a public accommodation from contracting away its obligations under Title III. Thus, "[t]he short answer" to petitioner's contention that a

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[19] See *Black's Law Dictionary* 693 (5th ed. 1979) (employer retains control over independent contractor "only as to end product or final result of his work"; independent contractor "contracts with another to do something for him").

[20] See Tr. 435, 473 (1100 golfers started in petitioner's qualifying school tournament); cf. *NCAA* v. *Board of Regents*, 468 U.S. 85, 102 (1984) (NCAA's role in organizing and marketing college football enhances opportunities for athletes, as well as fans). Petitioner is thus similar to those public accommodations that sell lottery tickets, host beauty pageants, game competitions, or science fairs, or invite comedians and other performing artists to compete for the opportunity to perform in their clubs.

[21] See H. R. Rep. No. 485, *supra*, Pt. 2, at 101 (subsection (iv) makes "clear" that "a public accommodation is not liable under this provision for discrimination that may be practiced by those with whom it has a contractual relationship, when that discrimination is not directed against its own clients or customers"); H.R. Conf. Rep. No. 596, *supra*, at 76 ("covered entities are only liable in contractual arrangements for discrimination against the entity's own customers and clients and not the contractor's customers and clients"); 28 C.F.R. Pt. 36, App. B, at 631.

definition deliberately confined to a single subsection should be expanded to govern an entire Title of the Disabilities Act "is that Congress did not write the statute that way." *United States* v. *Naftalin*, 441 U.S. 768, 773 (1979).

Second, even if this case involved liability under subsection (b)(1)(A), it would be a mistake to give "clients or customers" the narrow meaning ascribed to it by petitioner. In the course of defining liability for contractors, Congress simply adopted "clients or customers" as a shorthand phrase for those who partake of the "goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation," 42 U.S.C. 12182(a). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1301 (2000) (internal quotation marks and citation omitted). Rather than permit one narrowly crafted subsection to drive an unnatural reading of the remaining statutory provisions, courts must "fit, if possible, all parts into a harmonious whole." *Ibid.* (citation omitted). Indeed, in *Daniel*, *supra*, this Court refused to adopt a similarly narrow reading of Title III's predecessor, the public accommodations provision of the 1964 Civil Rights Act, that was "restricted to the primary objects of Congress' concern" because "a natural reading of its language would call for broader coverage." 395 U.S. at 307. In light of Congress's underlying purposes, a natural reading of Title III as a whole should also be adopted here.

Third, subsection (iv) cannot be read as a broad limitation on Title III's coverage. The legislative history stressed that, "to the extent there is any apparent conflict" between subsection (b)(1) (which includes (iv)) and the specific provisions of subsection (b)(2) (which include respondent's reasonable modification claim), the latter prevails. S. Rep. No. 116, *supra*, at 61; see also H.R. Rep. No. 485, *supra*, Pt. 2, at 104 (same). That is consistent with the legislative history

emphasizing that the "clients or customers" language was intended only to clarify the scope of contractual liability, rather than to limit the overall operation of Title III. See H. R. Rep. No. 485, *supra*, Pt. 2, at 101.

Fourth, petitioner's proposed construction is irreconcilable with Congress's definition of covered public accommodations, in 42 U.S.C. 12181(7). If the "marketplace" approach extended coverage only to paying clients or customers, it would render Title III inapplicable, despite the explicit inclusion of concert halls, auditoriums, lecture halls, and other places of public gathering and exhibition (42 U.S.C. 12181(7)(C) and (D)), to any concerts, lectures, or performances offered to the public free of charge, and to any amateur exhibitions or meetings of political or social groups that are open to the public. And even if petitioner's construction included nonpaying "customers," it would seem to exclude all who perform services rather than receive them. Thus, while a "homeless shelter" or a "food bank" is covered by Title III (42 U.S.C. 12181(7)(K)), volunteers in such establishments would lack any protections. While hospitals (42 U.S.C. 12181(7)(F)) and transportation facilities (42 U.S.C. 12187(G)) are public accommodations, the coverage would extend only to patients, and not their visitors, and only to travelers and not persons picking them up or dropping them off. Colleges (42 U.S.C. 12181(7)(J)) would be covered for students, but not for employers who wish to recruit at a job fair. Companies sponsoring spelling bees would be covered with respect to the audience, but could exclude disabled children from participating. In short, where Congress provided for blanket coverage of social and economic activity in places of public accommodation, petitioner offers a reading of Title III that is as gap-ridden as Swiss cheese.

Finally, even if adopted, petitioner's "marketplace" rendition of Title III would not support its claim. Because respondent paid petitioner to participate in its golf tourna-

ments and because petitioner exists entirely "to promote and operate tournaments for the economic benefit of its members," Pet. App. 46a, respondent could easily be considered a paying "client" of petitioner.

II. THERE IS NO REASON TO DISTURB THE LOWER COURTS' FACTUAL DETERMINATION THAT PERMITTING RESPONDENT TO USE A GOLF CART WILL NOT FUNDAMENTALLY ALTER PETITIONER'S COMPETITIONS

A. Petitioner argues that the fundamental alteration analysis should begin and end with an inquiry into whether the rule of competition implicated by the individual's disability is a "substantive" rule of competition with a "possible (non-trivial) effect on the outcome" (Br. 35). Respondent and the court of appeals, by contrast, place heavy reliance on the question whether modification of the rule would afford an individual a competitive advantage. See Pet. App. 10a-11a. In our opinion, while both considerations are important in the fundamental alteration analysis, neither one should be dispositive. Rather, the application of Title III to competitive sports, like its application to educational, trade, and professional examinations (42 U.S.C. 12189), requires a judicial determination of what skills and abilities the competition is intended to test and whether the proposed modification would substantially alter the measurement of those skills and abilities. Cf. 28 C.F.R. 36.309(b)(3); 28 C.F.R. Pt. 36, App. B, at 653. In applying that test, a variety of factors should be considered, focusing ultimately on whether modifying a rule for a particular plaintiff would fundamentally alter the competition at issue. See *Washington* v. *Indiana High Sch. Athletic Ass'n*, 181 F.3d 840 (7th Cir.), cert. denied, 120 S. Ct. 579 (1999).[22]

[22] There is no basis for crafting a special exemption for professional-level sports competitions (see USGA Br. 8, 21). The private club and religious organization exemption (42 U.S.C. 12187) leaves little doubt that Congress knew how to write such exemptions when it wanted them, and it did not write one for professional sports. The legislative history, moreover, expressly anticipated the Act's application to a variety of professional sports. See, *e.g.*, H.R. Conf. Rep. No. 596, *supra*, at 66. Thus, like other civil rights legislation, the Disabilities Act tolerates no glass ceiling for qualified athletes with disabilities.

First, a court must determine whether a rule or condition of competition is substantive in the sense that it regulates those aspects of play that the competition is designed to measure. A rule's label as "substantive," however, cannot be dispositive, lest public accommodations be permitted to define their competitions out of Title III. Rather, the court should inquire into written or otherwise documented understandings of the essential elements of a particular competition and what it is designed to measure. The court should also consider evidence of the particular rule's (1) status in the written rules and regulations of a competition, (2) foundation in historic practice and/or established record as an unwritten rule or standard, (3) consistency in application, and (4) adoption of or adherence to by other entities that host the same or closely similar competitions.

The court's determination that a rule is non-pretextual and genuinely substantive in the sense that it regulates those aspects of play that the competition is designed to measure will carry substantial weight in the fundamental alteration analysis. We disagree, however, with petitioner's contention that such a conclusion necessarily ends the inquiry. Sometimes a modification that is sufficiently minor or tailored can be made without affecting the integrity of the competition or altering the contest's ability to measure fairly the relevant capabilities. For example, Major League and Minor League Baseball permitted Jim Abbott, a pitcher who was born without a right hand, to deviate from the rule that "a pitcher must remain completely still before his delivery" and allowed him to "spin the ball" slightly in his hand before pitching to accommodate his disability. Jim Abbott, "It's

Easy to Accommodate," *Golf World* 92 (Feb. 20, 1998). Furthermore, Congress could fairly be concerned that the technical wording of admittedly substantive rules could reflect the prior invisibility of athletes with disabilities, such that reformulating the rule in light of an individual athlete's disability could be accomplished without discernibly affecting the competition. For example, the United States Golf Association's (USGA) *Rules of Golf* (1997) generally require golfers to play a ball where it lies. *Id.* Rule 13-1. In those situations where a player is permitted to alter a ball's lie by lifting and dropping it, the rules require the golfer to "stand erect, hold the ball at shoulder height and arm's length and drop it." *Id.* Rule 20-2. Dropping the ball "in any other manner" results in a penalty. *Ibid.* That rule could reasonably be modified to permit wheelchair golfers to sit erect rather than "stand" without fundamentally altering the competition. See USGA, "A Modification of the Rules of Golf for Golfers with Disabilities," Rule 20-2 (1997).

A court also could reasonably require substantive rules to be read with a practical sensitivity to the unique situation of competitors with disabilities. For example, the substantive rule of golf that prohibits players from "us[ing] any artificial device or unusual equipment * * * [w]hich might assist him in making a stroke or in his play" could be construed not to encompass artificial limbs or leg braces (at least absent any peculiar, play-affecting modification). *Rules of Golf*, *supra*, Rule 14-3. Likewise, application of the substantive rule against taking an "unnecessarily abnormal stance, [or] swing" in the rules governing temporary immovable obstructions (see *id.* App. 1; J.A. 119, 128) could reasonably be required to take account of an individual's disability in determining whether the stance is "unnecessary."

Second, a court may consider the extent to which a proposed modification would afford a player a competitive advantage. Any modification that poses a realistic risk of giving one player a competitive advantage would skew and

thus fundamentally alter the competition's measurement of ability. That does not mean, however, that the absence of a competitive advantage is always dispositive. In some circumstances, there is more to a competition than the final score or who finishes first. Thus, even if a competitor's disability would offset any abstract advantage enjoyed by the modification, a modification still would not be reasonable if it interfered with the competition's ability to measure a physical or mental capability that it is designed to evaluate. In addition, courts should consider the extent to which a modification could substantially alter the pace or flow of a game and thus interfere with other players.

Third, a court should consider the circumstances in which exceptions are authorized or have been made to the rule. The frequency and character of exceptions or modifications both outside and within the disability context will be acutely relevant in evaluating both what a particular competition measures and whether a proposed modification would fundamentally interfere with the competition's ability to evaluate the relevant capabilities. An established practice of modifying a rule for individualized circumstances (such as temporary illness or injury, economic considerations, convenience, or efficiency) will often support an equivalent modification for a disability. On the other hand, a rule that is virtually never modified in its operation absent imperative safety concerns or other extraordinary and rarely arising circumstances will make modification harder to justify.[23]

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[23] Petitioner (Br. 33, 36-41) suggests that, because athletics "are contests of *physical* performance" (*id.* at 33), the Disabilities Act cannot functionally police the rules and conditions of athletic contests. That argument overlooks, however, that many (if not most) disabilities affect only part rather than all of an individual's physical and mental capabilities. Likewise, not all sports comprehensively test an individual's physical and mental abilities from head to toe. The Disabilities Act thus properly polices stereotypes and overgeneralizations about the impact of particular disabilities on an individual's ability to engage in "contests of physical

B. In the vast majority of athletic competitions at the highest level, a request to waive a rule of competition will effect a fundamental alteration in the sport. According to the facts as found below, this case qualifies as an exception to that general rule. The lower courts found that the walking rule can be modified because the rule does not regulate those aspects of play that golf competitions are designed to measure and its waiver will not give respondent a competitive edge. The district court examined whether walking was one of the capabilities intended to be measured by the game of golf and noted that the *Rules of Golf* neither require walking nor define it as part of the sport. Pet. App. 30a. Rather, the rules make clear that the "Game of Golf consists in playing a ball from the *teeing ground* into the hole by a *stroke* or successive strokes." *Rules of Golf* 1-1. In addition, the court examined the walking rule's status, noting that the United States Golf Association permits competitors to ride a cart unless it is prohibited by the rules of a particular event. Petitioner also permits competitors to use carts in some of its tournaments, including the Senior Tour and the early rounds of the qualifying tournament. Pet. App. 28a n.9 & 30a.[24] And even in the regular PGA and Nike Tour events where walking is generally required, petitioner allows the Tours' respective Rules Committees to authorize the use of carts to speed play when balls are lost or long distances separate holes. *Id.* at 9a, 30a-31a. Further, when carts are permitted, petitioner imposes no stroke penalty on those who use them to offset the supposedly lessened fatigue. Finally, the court noted that, although collegiate golf prohibits carts, respondent was permitted to use a cart in his college tournaments. See *id.* at 28a.

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performance" by requiring careful analysis of the nature of the disability and the athletic competition at issue.

[24] Indeed, until the year respondent first competed in the qualifying tournament, petitioner allowed golf cart usage in all three rounds of that tournament. J.A. 267.

The district court further found that permitting respondent to use a cart will not give him an unfair competitive advantage. Accepting that the purpose of the walking rule was to inject a fatigue factor into shot-making, the court found that the fatigue involved in the "lower intensity exercise" of walking the golf course during a competition "is primarily a psychological phenomenon," and that "[s]tress and motivation" are key to the level of fatigue. Pet. App. 34a. The court of appeals found ample evidence to support those conclusions. *Id.* at 10a.[25]

The district court also found, based upon medical and other evidence, that "[t]he fatigue [respondent] endures just from coping with his disability is undeniably greater than the fatigue injected into tournament play on the able-bodied by the requirement that they walk from shot to shot." Pet. App. 35a. The district court explained that respondent

> is in significant pain when he walks, and even when he is getting in and out of the cart. * * * The other golfers have to endure the psychological stress of competition as part of their fatigue; Martin has the same stress plus the added stress of pain and risk of serious injury. As he put it, he would gladly trade the cart for a good leg.

Id. at 36a.[26]

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[25] The district court explained that the fatigue caused by walking "cannot be deemed significant under normal circumstances." Pet. App. 33a. The court noted that the PGA does not require golfers to walk rapidly between shots, and that walking at a slow pace is a natural act for the able-bodied. *Id.* at 35a & n.14. The court also noted that "most PGA Tour golfers appear to prefer walking as a way of dealing with the psychological factors of fatigue," asking rhetorically that "[i]f the majority of able-bodied [golfers] elect to walk in 'carts optional' tournaments, how can anyone perceive that [Martin] has a competitive advantage by using a cart given his condition?" *Id.* at 34a-35a.

[26] The court of appeals also noted that respondent must walk approximately 25% of the course in any event because the cart frequently cannot be brought near to the ball. Pet. App. 36a; see also *ibid.* (district

The court of appeals affirmed the district court's finding that "permitting [respondent] to use a golf [cart] in PGA and Nike Tour competitions would not fundamentally alter the nature of those competitions." Pet. App. 10a. The court emphasized that "[t]he central competition in shot-making would be unaffected by [respondent's] accommodation," *id.* at 10a-11a, because "[a]ll that the cart does is permit [respondent] access to a type of competition in which he otherwise could not engage because of his disability." *Id.* at 11a. Those concurrent findings by the two lower courts should not be disturbed. See generally *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac Co.*, 321 U.S. 275, 278 (1944).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 2000

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court finds that, even with a cart on a course "roughly five miles in length, [respondent] will walk 1¼ miles").

Supreme Court, U.S.
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(4)

No. 00-24

OCT 30 2000

In The
SUPREME COURT OF THE UNITED STATES
October Term, 2000

PGA TOUR, INC.,
Petitioner,

v.

CASEY MARTIN,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF KENNETH R. GREEN, II IN SUPPORT OF PETITIONER

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Dated: October 30, 2000

10pp

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INTEREST OF *AMICUS CURIAE*

Kenneth R. Green, II[1] ("Kenny"), is a freshman at Mississippi State University who has a great interest in golf. Kenny was the 1998 Middle Tennessee High School district and regional golf champion while a student at Clarksville High School in Clarksville, Tennessee. Kenny expects to play golf on the college level and to eventually play the PGA Tour. Kenny's major at Mississippi State University is Professional Golf Management. Kenny is an honor student. In 1999, Kenny was given the "Spirit of Golf Award" by the Tennessee Junior Golf Tour. Kenneth R. Green, II is listed in *Who's Who of American High School Students, Who's Who of America's High School Athletes* and was the 2000 Most Valuable Golfer for the Clarksville Leaf-Chronicle Newspaper's All-Region Golf Team.[2]

Kenny had complications at birth and eventually, (as a small child), had his left leg amputated from slightly above the ankle. *The Memphis Commercial Appeal*, (Newspaper) "Sports" page D-1 (August 11, 1999). Kenny wears a prosthetic leg for both everyday activities as well as sports.[3] Pursuant to rules and

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[1] Pursuant to Sup. Ct. Rule 37.6, Kenny asserts that neither Petitioner nor Respondent or their agents assisted Kenny or Kenny's counsel, in any way (even with expenses), in preparing this brief. *Pro bono* counsel was admitted to the bar of this Honorable Court on September 18, 1992. Consent to file this brief was given by both Petitioner and Respondent.

[2] Kenny was also picked "Best Personality" of his senior class at Clarksville High School (Class of 2000) and was active in his church youth group at First Church of the Nazarene in Clarksville, Tennessee.

[3] Kenny played junior varsity basketball at Clarksville High School.

custom, Kenny walks the golf course when playing in local, regional and national golf tournaments. Kenny also usually walks the course while playing golf simply "for fun".

In mid-June, 1999, Kenny and his father attended the Tennessee Bar Association Annual Convention in Pinehurst, North Carolina at the world famous golf resort there as a guest of current *pro bono* counsel who was a "CLE" speaker for said annual convention.[4] The week after the TBA Convention ended, the "U.S. Open" professional golf tournament was held at the same resort at Pinehurst, North Carolina. While walking the course where the U.S. Open would be played, Kenny talked about the Casey Martin case, (which was argued at the Ninth Circuit about a month prior to the TBA Convention). Kenny indicated that if said matter ever came before this Honorable Court, that Kenny wanted to "have a say" because of the close similarity of the two golfers' situations, but the stark contrast in their views related to modifying current PGA tournament rules. Pursuant to that conversation, and counsel's promise to Kenny, this *amicus* brief is being presented.

SUMMARY OF THE ARGUMENT

From the perspective of a golfer that has considerable skill and talent in the area of golf and also

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[4] *Pro bono* counsel is the Associate General Counsel for the Tennessee Bar Association ("TBA") and Kenny Green's Sunday school teacher. *Pro Bono* counsel does not play golf. This brief does not necessarily reflect the views of the Tennessee Bar Association, but only reflects the personal views of Kenneth R. Green, II.

from the perspective of a handicapped person that plays tournament golf; the whole nature of professional golf tournaments will be fundamentally altered if the decision of the Ninth Circuit in *Martin v. PGA Tour, Inc.*, 204 F.3d 994 (9th Cir. 2000) is upheld. The more rational logic is the view set forth by the Seventh Circuit in *Olinger v. U.S. Golf A'ssn*, 205 F.3d 1001 (7th Cir. 2000). The decision of the Ninth Circuit should be reversed as golf carts fundamentally alter the nature of professional golf competition in violation of 42 U.S.C. sec. 12182(b)(2)(A)(ii). While Petitioner may someday modify its rules; until all professional golfers at PGA Tour events can ride in golf carts if they so choose; no single professional golfer should be allowed that substantial advantage in PGA Tour tournaments. Neither this Honorable Court, nor lower courts, should mandate the rules of professional golf.

ARGUMENT

An old Native American saying declares "Never judge a man until you walk a mile in his moccasins". In the case at hand and the *Olinger* case, professional golfers testified about how the "fatigue factor" applies to a golf tournament. *See e.g., Olinger*, 205 F.3d at 1006 discussing Ken Venturi and *Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242, 1250 (D. Or. 1998). The only truly applicable comparison would be that of Ben Hogan after his 1949 automobile accident. *See, Olinger*, 205 F.3d at 1007. While fatigue is clearly a major factor, even to the able bodied tournament golfer, *See, Olinger*, 205 F.3d at 1006 discussing Ken Venturi; the true focus is whether or not mandated cart modifications for a single competitor fundamentally

alters this professional sport. 42 U.S.C. sec. 12181(b)(2)(A)(ii). In *Martin*, the Ninth Circuit said, "No", *Martin*, 204 F.2d at 1002 fn. 9; but specifically noted that ruling conflicted with the findings in *Olinger*. The true test should be how fatigue affects golfers that are handicapped. To consider this, the focus must be on golfers that are physically disabled that play competitive golf tournaments. Kenneth R. Green, II can be a valid comparison.

In tort law, the theory of the "eggshell plaintiff" exists. *See e.g., Doty v. Sewall*, 908 F.2d 1053, 1059 (1st Cir. 1990). Basically, the theory of the eggshell plaintiff states that a tortfeasor or criminal takes his victim as he finds him. *U.S. v. Feola*, 420 U.S. 671, 685 (1975). This includes physical or mental defects or physical/mental extra-ordinary abilities. *Doty*, 908 F.2d at 1059. This same logic applies to the field of professional sporting contests. The blatant difference between a "weekend hacker" and a professional is that the professional has thousands, and occasionally, millions, of dollars riding on their skill. As a matter of fact, according to the professional golfers' internet website "PGA Tour.com", Respondent has earned over $100,000.oo in the year 2000 playing golf. If a "Mulligan" is not allowed in a professional tournament because a single golf shot can determine hundreds of thousands of dollars between first and second place purses; surely a golf cart is also an unfair advantage when one reaches the professional golfer skill level.

The very nature of the professional level at any sport demands that the competitors prove themselves to be far and away superior in talent to the average player. *Accord*, *Martin*, 994 F. Supp. at 1248 fn. 9. Each person who reaches that level has overcome

some sort of hindrance; be it nearsightedness, obesity, mental focus or a physical handicap. Athletes such as baseball's Jim Abbott[5] or football's Tom Dempsey[6] set standards in spite of their handicaps, not because of them. When Dempsey set a National Football League record 63 yard field goal, no asterisk was put in the record books that said the player was allowed extra consideration because of his handicap which makes this a questionable record. Baseball players that "fanned" on a Jim Abbott fastball cannot say the strikeout was due to modified standards to accommodate Abbott's arm. Kenny asserts that the whole complexion of the professional game of golf changes if one competitor does not have to walk the course. It does a disservice to all professional golf players to fundamentally alter the nature of the competition by giving any one person any competitive advantage. Respondent is too good of a golfer to have an asterisk after any victory he wins. If one questions that riding in a golf cart will not be perceived as an unfair advantage, simply ask the person with the highest score that did not "make the tournament cut" when Petitioner did make the cut while riding in a golf cart.

Kenneth R. Green, II believes that either all professional golfers should walk the course or all professional golfers should be allowed to ride in golf carts if the Petitioner voluntarily changes its rules. Until such time, Respondent should be content with the

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[5] A Major League Baseball all-star pitcher who is missing one arm from the elbow down. *Who's Who In America*, 51st ed. "Jim Abbott", 3 (Marquis, 1997).

[6] A record setting field goal kicker for the New Orleans Saints who only had one-half of his kicking foot and a withered right hand. *The Complete Book of Football*, 149-150 (Arno Press, 1980).

honor, and large paychecks, associated with being PGA Tour professional. The only "handicap" Kenny wants associated with his golf game is the one assigned by the U.S. Golf Association to all golfers who play regularly. The judgment of the Ninth Circuit should be reversed. A golf cart in a PGA Tour event for one golfer would fundamentally, and dramatically, give that golfer an unfair competitive advantage. Every golfer must overcome some disability to master the game. For some it is a "hook" or "slice" swing. For some it is putting. Others, like Kenny and Respondent, find fatigue or concentration the "thorn in the flesh".[7] All competitors, even Tiger Woods, will eventually be overtaken by the disabilities associated with aging.[8] Irregardless, the holes and sand traps are the same distance from the tee for all competitors. The rest of the rule of the game should also apply uniformly to all competitors; no matter what their "handicap".[9]

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[7] *See*, ***The Holy Bible***, (NIV), II Corinthians 12:7-9 (Zondervan, 1981). While the Bible does not specify what St. Paul's physical ailment was, it is clear he overcame his disability without complaint or special consideration.

[8] Could Mr. Justice White have realistically returned to his previous career in the National Football League on the day Mr. Justice White retired from this Honorable Court?

[9] Clarksville, Tennessee has produced several other top-notch athletes that overcame physical disabilities to reach national prominence. Wilma Rudolph, who won three gold medals at the 1960 Olympics, overcame polio without asking for special rule modifications. Sugar, *The 100 Greatest Athletes of All Time*, "Wilma Rudolph", 289 (Citidal Press, 1995). Professional Golfer Mason Rudolph had vision problems, Rudolph, *The Rudolph Family of Tennessee*, 2d "Mason Rudolph", 206 (1997), and Bonnie Sloan was the first deaf player in the National Football League. *See*, www.Deaf Professional Football/Bonnie Sloan.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit, in *Martin v. PGA Tour, Inc.*, 204 F.3d 994 (9th Cir. 2000) should be reversed.

Respectfully Submitted,

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IN THE

Supreme Court of the ~~United States~~

NOV 13 2000

PGA TOUR, INC.,

Petitioner,

—v.—

CASEY MARTIN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR ATP TOUR, INC. AND THE LADIES PROFESSIONAL GOLF ASSOCIATION, *AMICI CURIAE*, IN SUPPORT OF THE PETITIONER

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THE INTEREST OF THE *AMICI CURIAE*

ATP Tour, Inc. (the "ATP Tour") is the organizing and governing body for the circuit of men's professional tennis tournaments worldwide. The Ladies Professional Golf Association (the "LPGA") organizes, administers and governs the LPGA Tour, a tour of women's professional golf tournaments. In this respect, both the ATP Tour and the LPGA are similar to the PGA TOUR as that organization is the governing body in men's professional golf in the United States. The ATP Tour and the LPGA have an interest in how the Americans With Disabilities Act (the "ADA") is applied to professional sports competitions.[1]

The ATP Tour generally adheres to the rules of tennis competition promulgated by the International Tennis Federation ("ITF"). As with most professional-level athletic competitions, however, the ATP Tour has certain rules of competition of its own, and the ATP Tour reserves the right to depart from the rules of the ITF.

The ATP Tour administered over 190 professional tennis tournaments in 1999 at a variety of different sites throughout the world, consisting of 74 tournaments in its top categories, and an additional 116 entry-level events (known as its Challenger Series events). Members of the ATP Tour include most major tournaments (except for the Grand Slam events) and the very best tennis players in the world. ATP Tour events are considered to be tennis competition at its highest level.

The LPGA is the pre-eminent women's professional golf association in the world. The LPGA Tour consists of over 40 professional golf tournaments in the United States and several

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[1] Letters from each party consenting to the filing of this brief have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part or provided a monetary contribution to its preparation and submission. *See* Supreme Court Rule 37(6).

foreign countries. No other women's professional golf association has stature, participation, attendance or level of competition comparable to the LPGA.

The LPGA Tour generally adheres to the rules of golf competition promulgated by the United States Golf Association (the "USGA"). As with many professional-level athletic competitions, however, the LPGA Tour has certain rules of competition of its own, and the LPGA Tour reserves the right to depart from the rules of the USGA.

SUMMARY OF ARGUMENT

The U.S. Court of Appeals for the Ninth Circuit made two critical errors in the decision below. First, by concluding that Title III of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* ("ADA") requires courts to consider the relative importance of the rules of a professional sport, and to decide (on a case-by-case basis) whether a particular rule should be modified to accommodate the physical limitations of a disabled athlete, the Ninth Circuit ignored the most essential nature of all athletic competition — and especially professional level competition: athletic competition is based on nothing more than an agreed-upon set of uniform rules, all of which, in interplay with one another, define the game. At bottom, the singularity of a sports competition and the autonomy of its rules compel the conclusion that any court-imposed modification or abrogation of a rule of how the game is played changes its fundamental nature.[2] Such fundamental alteration is not required by the ADA.

Athletic competition is *supposed* to favor the more skilled and physically able. It is a test of who is the "best" at mastering the game as defined by its rules, and it is this characteristic that makes it compelling to both competitors and spectators. When courts begin to change the rules of how the game is played to assist a particular individual with a disability, this essential characteristic is vitiated. A competition judicially managed to eliminate this or that "unfairness" may appear more "fair" in the view of a court because less skilled or less able-bodied individuals may be able to compete, but it is not the same athletic competition envisioned by the creators and fans of the game. The fundamental fairness of the game — *i.e.*, that all the rules apply equally to all competitors — has changed, and we no longer have a competition that tests who is the 'best" at that particular game.

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[2] We are, of course, referring to those rules which affect play.

Second, the Ninth Circuit erred in concluding that the playing area of a professional golf tournament is a "place of public accommodation." The operative statutory language describes twelve types of "places of public accommodation" and a professional golf tournament does not fall within any of these categories. The two possibilities identified by the Ninth Circuit (*i.e.*, a place of "exercise or recreation" or a place of "entertainment or exhibition") simply do not apply. A golf course, when *used* for a professional golf tournament, is not being used as a place of "exercise or recreation." Certainly no competitor or spectator would consider the competition to be a form of exercise or recreation. To the extent a golf tournament is a place of entertainment, it is so only with respect to the places to which the public is permitted access (*i.e.*, the viewing areas, the bathroom facilities, the concession areas), not in the space where the athletic competition is waged. Simply because the sections of the course set aside for the gallery are open to the public does not render the competitive area where the public is not permitted (such as the playing area of an LPGA golf tournament, or the field of a professional baseball league, or the tennis courts at the National Tennis Center during the U.S. Open, or a bob-sled track during the Olympics) subject to the public accommodations provisions of Title III.

ARGUMENT

I. ANY ABROGATION OR MODIFICATION OF A SUBSTANTIVE RULE OF PROFESSIONAL ATHLETIC EVENTS WOULD FUNDAMENTALLY ALTER THE NATURE OF THE COMPETITION

The rules that a professional sports organization establishes for its competition are fundamental to the existence and definition of the sporting event. The dangers inherent in the Ninth Circuit's decision are most vividly seen by identifying examples of other "accommodations" that the courts might impose on professional sporting competitions in the name of advancing access by the disabled. Such a list might easily include, for example, reducing the height of the basket to

accommodate a short or even wheelchair-bound basketball player, giving a "head start" to a runner who has a circulatory condition in her legs that may lead to excessive cramping, increasing the length of rest periods between points or games to accommodate a tennis player who suffers from a heart condition or other disability that affects endurance, or even permitting a vision-impaired football player to touch an opposing lineman before the play begins in order to gauge his distance to the line of scrimmage. Indeed, the boundaries of such a list are as broad as the labyrinthian rules that define sport are complex. Nonetheless, the Circuit Court's decision paves the way for each such "accommodation," no matter how far-fetched the example might be, without any discernable limits or practically manageable standards.

The Court of Appeals may have intended that only those "rules of the game" that might be said not to fundamentally alter the nature of the competition be subject to accommodation and compromise, and may have believed that such a standard could be rationally implemented. But even so it erred, for that court's implicit belief that "there are rules and then there are *rules*" ignores four immutable, defining elements of all athletic competition.

First, every competition or "game" is, in the end, nothing but a set of manufactured rules, with each rule contributing to, and therefore defining, the nature of the competition. Who can recall, or even know, why bases are ninety feet apart? Who can explain why a tennis player who touches the net during play automatically loses the point? These are simply the rules, and the point, of course, is that *every* rule of athletic competition is, by definition, fundamental to *that* game, whatever that game might be.

Even though, or more accurately precisely because, every rule helps define the particular game, any change in any rule of competition must perforce fundamentally alter the nature of the competition. Change the size of the ball and the distance from the pitcher's mound to home plate and you no longer have

baseball — you have softball, or stickball, or something entirely different than professional baseball. Change the length of a Canadian Football League field from 110 yard to 100 yards to conform to the usual way "football" is played in the United States, and you may still have "football" in the generic sense of the sport, but you no longer have Canadian Football League football. And that of course is part of the majesty of sport; it is anything the designers of the rules want it to be, autonomous and, within its realm, sovereign. As such, each variation heralds a new form of competition, a new game.

Indeed, the rules of athletic competition are simply designed to provide a standard against which to distinguish among competitors. There is no "reason," for example, why the height of the net cord at center court during an ATP Tour tennis tournament must be exactly three feet; why a tennis court must measure precisely 78 feet by 27 feet; or why a tie-breaker is played at six games all in a set, and that the first player to reach seven, with a margin of two points, wins the tie-breaker. There is no reason why the size of the hole in a golf tournament must be 4 1/4 inches in diameter: it could be larger and make the skill of putting somewhat less critical in comparison to other skills in the sport. This is simply how the games are played, and what the games are. The rules may be changed, but then the game will be changed as well.

How many children are forced to create their own rules to accommodate the circumstances of the moment, as when the shape of the field, or the uneven number of players, or the lack of equipment forces them to imagine a new and different variation of the game they may have intended to play? What they devise is a new game played by different rules, no matter how much it might resemble another. For the same reason, whether a variation of a traditional game is more or less fair for the disabled athlete than the game it replaced, or, for that matter, more or less interesting to the public at large, is entirely besides the point. Respecting that simple proposition means

that any change to any rule of any game fundamentally affects the nature of the competition.

Second, every athletic competition is intended and designed to reward and favor the most able. In this sense, every "accommodation" to improve access to the competition by a would-be participant (whether disabled or not) or to adjust for different physical abilities is, by definition, a fundamental and material compromise of the competition itself.

To some, it undoubtedly seems "unfair" that few athletes are born with the natural athleticism of Michael Jordan, Pete Sampras or Karrie Webb. And it might seem particularly unfair that an athlete can prevail, or fail, in a competition (or be unable to compete altogether) because of inherited physical characteristics such as height or strength, or because of vastly different training opportunities (such as limited opportunities in the athlete's homeland). Yet by its very nature athletic competition does not seek to compensate for these inequities; to the contrary, it is precisely these inequities in abilities, and the testing of such disparate abilities *according to a uniform set of rules* defined by the governing sports organization, that is at the heart of competitive sport.

Third, only those charged by tradition or agreement with enforcing the rules of the game may amend them, else the game itself is fundamentally changed. Since the game is but a collection of its rules, it is, in the end, only what those in charge say it is. The "keepers" of the game must therefore have ultimate control over what does or does not affect the nature of the competition, much the same way an umpire or referee is, by tradition and agreement, the final arbiter of an on-field dispute. It is not so much whether the runner stealing a base was "safe at second," or whether the tennis ball hit the line, as whether the umpire thought it so. In other words, the rule-making is itself part of the game, and its impact cannot be measured by objective criteria (or even, in the case of the stolen base or the long forehand, by absolute truth). It is only the convention that

all will follow the same rules, determined by the same governing body, that gives meaning to the game.

Fourth, the integrity of every athletic competition depends entirely upon the uniform application of agreed-upon rules. The fairness of the event is determined not by "leveling the playing field" to encourage access by the many, but by ensuring that every competitor must play on the same field, however unlevel it might be, so that only a small few who possess superior physical and mental abilities will succeed against the common challenge. Fairness therefore dictates that there be no exceptions or accommodations, only the same rules for all.

Reduced to its essence, athletic competition is nothing more than an established set of rules applied equally to all competitors, who bring to the competition their own unique physical and mental attributes, training, and skills. The athlete whose unique personal characteristics happen to be superior to the other competitors, when measured by the established rules of the game, prevails in the competition.

By concluding that it is reasonable to abrogate a rule governing how professional golf is played in the PGA TOUR to accommodate a single competitor, and that such an abrogation would not fundamentally alter the nature of the competition, the Ninth Circuit ignored these most fundamental characteristics of professional athletic sports. Indeed, it is the singularity of the rules and the nature of athletic competition that renders professional sports entirely unique from public accommodations covered by Title III of the ADA (such as libraries, restaurants and museums), whose policies and procedures are incidental to, but not the essence of, the "public accommodation" itself.[3]

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[3] The examples provided in the Department of Justice's Technical Assistance Manual of the types of policies and procedures that may have to be modified confirm that such

(continued...)

Because it springs from a misapprehension of the nature of professional athletic competition, it is not surprising that the Ninth Circuit's decision defies rational implementation in two separate respects. First, the decision below would have courts evaluate the importance of a particular rule, when the essence of a game necessarily depends on the interplay of *all* the rules. It makes no sense to consider whether it is "important" that the net cord during a tennis tournament be exactly three feet from the ground at center rather than two, or whether it is "important" that a tennis court be 27 feet wide rather than 25, or the importance of a rule requiring a golfer to walk from one hole to another. Judges could of course change all of these rules, but then the competitors would have a different game — one that, if tennis or golf at all, is not ATP Tour tennis or PGA golf or LPGA golf.

Second, the decision below seeks to render more "fair" an aspect of competition that seems unfair — the personal characteristics that the athlete brings to the competition — by requiring an exception to a rule of the game that is otherwise applied uniformly, and fairly, to all competitors. But doing so vitiates the very essence of competition by seeking to make fair that which must be unfair (the different athletic abilities of the contestants), thereby making unfair that which previously was fair (the uniform application of rules). Subjecting an athletic competition to this sort of "tinkering" changes the fundamental characteristics of the competition. No longer is it a test of who is the most skilled or most able to perform that competition.

The Ninth Circuit's failure to appreciate fully the essential characteristics of athletic competition is nowhere more obvious

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[3] (...continued)

policies and procedures are not so closely identified with the fundamental purpose of the accommodation (*e.g.*, emergency evacuation procedures of a private health clinic, procedures for reserving motel rooms). Department of Justice Technical Assistance Manual § III-4.2100.

than in its conclusion that an "individualized inquiry" is necessary to determine, on a competitor-by-competitor basis, whether a relaxation or modification of a rule of the game for a disabled competitor would fundamentally alter the game, or give a particular disabled competitor an advantage. The court suggests, at least in the case of Casey Martin, that the walking requirement could be eliminated because Martin's disability was such that he would still be sufficiently fatigued by the limited walking he would have to do. *Martin v. PGA Tour, Inc.*, 204 F.3d 994, 1001-02 (9th Cir. 2000). But the fact that Martin was substantially disadvantaged by application of this uniform rule is precisely the point: athletes who, for whatever reason, cannot perform as well as others when measured against the uniform rules of the game are not supposed to win! In fact, if their particular physical traits (*e.g.*, height, weight, strength, endurance) or psychological characteristics (*e.g.*, ability to concentrate, risk aversion, "mental toughness") create sufficient barriers, they may not be able to compete effectively at all. The "game" is designed to test for those characteristics and to make them outcome determinative, not to compensate for individual differences.

In the context of professional tennis or professional golf, the consequences of an "individualized inquiry" into the effects of altering a rule of play for a particular disabled athlete could have obviously prejudicial results. Would it mean, for example, that, depending on the results of an "individualized inquiry," a professional tennis player with a tendency to skin cancer could insist on playing only at night? Or that one with a heart problem might demand two minutes rather than 20 seconds between points to ensure that he can compete during a point at the same level of play as an able-bodied player? And how would it be possible to verify the "need" for the additional time at any particular point in the game? Would a player with a mobility impairment be permitted to cover a smaller court if he could demonstrate that he would have no advantage because it would be difficult for him to cover even the smaller court due

to his condition? Would a golfer with a motor control disability be entitled to putt into a larger hole if, because of her condition, her chances of sinking the putt were no better than other non-disabled professional golfers? The rationale of the Ninth Circuit would seem to require consideration of such accommodations notwithstanding the impossibility of rational implementation, the absence of judicially manageable standards, and the obvious impact such case-by-case changes would have on the competition itself.[4]

At bottom, the decision of the Ninth Circuit invites courts to create new athletic competitions that, in the court's view, give disabled athletes a better chance at competing. However laudable it might be for courts to create new sporting competitions, with constantly adapting rules so that disabled individuals might be able to compete more effectively, doing so is clearly beyond the intended scope of the ADA.

In the realm of professional sports, such an expansion of the ADA would be particularly devastating, inasmuch as a professional sport depends on its entertainment value for its very existence. Fans and spectators want to know who is the fastest, the strongest, the most able or the most skilled at a given competition. It is the unbiased and uncompromising determination of who is "the best" that fascinates the public, and gives professional athletics its significant entertainment value. No professional athletic competition attempts to compensate for the different physical abilities of athletes or gives a particular athlete a waiver or exemption from a substantive rule, and a professional sport that would attempt to do so would quickly jeopardize its entertainment value.

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[4] Such an approach is diametrically opposed to one of the explicit purposes of the ADA, which is to create "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(2).

Accordingly, any modification of a rule of professional athletic competition would necessarily and fundamentally alter the nature of the competition and its entertainment value. The ADA requires no such result.[5]

II. THE COMPETITION AREA OF A PROFESSIONAL-LEVEL ATHLETIC EVENT IS NOT A "PLACE OF PUBLIC ACCOMMODATION" UNDER TITLE III OF THE ADA

The Ninth Circuit's conclusion that the playing area of a professional golf tournament is a "place of public accommodation" is plainly contrary to the ADA's statutory language and legislative history for the reasons articulated by the PGA TOUR, and as explained below.

Title III's definition of a place of public accommodation consists of a list of examples of places that are covered by Title III, followed in each case by a specification of the kind of activity or function included and a categorical inclusion of other places falling within that specification (*e.g.*, "A museum, library, gallery *or other place of public display or collection*"; "A park, zoo, amusement park, *or other place of recreation*"; "A gymnasium, health spa, bowling alley, golf course, *or other place of exercise or recreation*"). 42 U.S.C. § 12181(7) (emphasis added). The grammatical structure of this definition plainly indicates that the specific examples of "places of public accommodation" are just that — examples of what is described generically in the balance of the definition. Indeed, many places that are not specifically mentioned in the definition nonetheless qualify as places of public accommodation because

[5] Of course, a sports league or governing body cannot create rules that are in reality simply a pretext for invidious discrimination, but there are other provisions of Title III that would prevent such intentional and discriminatory exclusion (*e.g.*, 42 U.S.C. § 12181(b)(1)(A)(i)). No one disputes that the PGA TOUR walking requirement was not created for the purpose of eliminating potential disabled competitors.

they meet the qualitative, generic definition. *See* 28 C.F.R. Pt. 36, App. B at 622-23 (Preamble to Regulations on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities (Published July 26, 1991)).

Conversely, notwithstanding that they may be specifically identified on the ADA's list of public accommodations, places that are purely private in nature are not regulated places of public accommodation. For example, although a "library" is included on the list, a private library in an individual home is not a place of public accommodation because it is not a "place of public display." 42 U.S.C. § 12181(7)(H). Similarly, a private "hotel" with permanent residents is not a place of public accommodation even though "hotel" is on the list because a private hotel is not a "place of lodging" (which, according to the Department of Justice, suggests only short-term stays). *See* 28 C.F.R. Pt. 36, App. B at 623.

The critical issue is not whether a specific "place" is mentioned, but whether the "place" falls within the descriptive criteria set forth in the definition. It is the descriptive language that necessarily governs, and coverage therefore depends on application of a functional test focusing on the nature of the use of the facility, as contemplated in Congress's choice of language and the statutory structure.[6]

[6] The Department of Justice's guidance on Title III of the ADA is consistent with the view that it is the functional descriptions of places of public accommodations that determine coverage. In its Technical Assistance Manual on Title III, the Department explains that places of public accommodation include "Places of exercise or recreation (*e.g.*, gymnasiums, health spas, bowling alleys, golf courses)." Department of Justice Technical Assistance Manual § III-1.2000. Answering the question "Can a facility be considered a place of public accommodation if it does not fall under one of these 12

(continued...)

Among Title III's definitions of a "place of public accommodation" is "a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation." 42 U.S.C. § 12181(7)(L). To fall within this type of "place of public accommodation," a place must necessarily fall within the descriptive part of this definition, *i.e.*, it must be a "place of exercise or recreation." Thus, public tennis courts, beaches, swimming pools, playgrounds and video arcades would fall within this definition to the extent they satisfy the functional definition (*i.e.*, to the extent they are places of exercise or recreation). *See* H.R. Rep. No. 116, 101st Cong., 1st Sess. at 59 (1989) (Senate Committee on Labor & Human Resources). However, to the extent a gymnasium, health spa, bowling alley, golf course (or for that matter a tennis court, swimming pool or beach) is not *used* as a place of exercise or recreation, it is not a place of public accommodation.

Under this functional test, the competition area of a professional golf tournament is quite obviously not a place of exercise or recreation — certainly no participants in the competition would view themselves as engaging in exercise or recreation as those terms are ordinarily understood, nor would a spectator or fan have such an impression. Although golf courses are places of public accommodation *when used as places of exercise or recreation*, on those occasions where the course is used for some other purpose such as a competition with highly selective participation criteria, the playing area of the course itself is not a place of public accommodation, although the public gallery may be. Similarly, although public tennis courts are generally used by the public for exercise or recreation, when a court is used for another purpose, such as a

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[6] (...continued)
categories?", the Department's guidance responds "No, the 12 categories are an exhaustive list. However, within each category the *examples* given are just illustrations." (*Id.*) (emphasis added).

professional competition, it is not being used for exercise or recreation and is therefore not a place of public accommodation.

The fundamental error made by the District Court and the Ninth Circuit in interpreting the definition of Title III is to have ignored the functional test required by the descriptive language in the relevant definition of place of public accommodation (*i.e.*, a "place of exercise or recreation"). The courts below improperly focused solely on the fact that a "golf course" is specifically included as an example of a place of exercise or recreation, ignoring the statutory functional test for determining what qualifies as a place of public accommodation. By taking the "examples" as the end of the statutory analysis without taking account of the full statutory provisions which include a specification of the *kinds* of places or activities to be regulated, the courts below simply misread and misapplied the statute. For the reasons set forth above, the courts below applied an incorrect interpretation of the statutory language, one with no warrant whatsoever in the legislative history.

Nor does the Ninth Circuit's alternative holding that a professional golf tournament is a place of public accommodation because it is a "place of exhibition or entertainment" support the conclusion that the actual playing area of the competition, where the public cannot go, is covered by Title III. That argument extends at most to the public areas of the tournament, *i.e.*, those areas from which the public views the exhibition or entertainment (and the public restrooms, concession areas and other facilities serving the public), but not to those areas where the public is not permitted — the playing-field, or tennis court. The plain statutory language and its functional test to determine coverage under Title III compels this result. The parameters of a "place of exhibition or entertainment" are necessarily limited to those aspects of the facility that are used by the public for exhibition or entertainment. *See Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237, 1241 n.5 (11th Cir. 2000) (while "a cruise ship contains some public accom-

modations [,]that does not mean that the entire cruise ship necessarily is subject to Title III"); *Bowers v. Nat'l Collegiate Athletic Ass'n*, 9 F. Supp. 2d 460, 482 (D.N.J. 1998) ("Mere operation of one place of public accommodation does not by itself subject every other aspect of the operator's business to Title III").

The public does not use the stage of a theatrical performance, or the playing area of a sports competition, for entertainment, but rather uses the public spectating areas, and the ADA has no application in determining what plays will be performed, what scenery used, or what scenes cut — any more than it regulates what rules of competition must be changed. Similarly, although the public areas of a museum or gallery would be a place of public accommodation, the private areas of the museum (*e.g.*, the office and storage areas, and the gallery walls where art is hung) are not "places of public accommodation" subject to the ADA; the ADA no more regulates what art will be purchased or stored, or whether brighter paintings must be acquired or darker ones moved for particular viewers, than it regulates the rules of professional sports competitions. *See* 28 C.F.R. Pt. 36, App. B. at 614-15 (1997). *See also Louis v. Ideal Cleaners*, Nos. C-99-1557, C-99-1814, 1999 U.S. Dist. LEXIS 19811 (N.D. Cal. Dec. 14, 1999). So too, a public tour route of a factory would be a place of public accommodation (because it is a place of exhibition), but not the areas that the public is not permitted — even if the public is able to view the other areas that are not covered. *See Jankey v. Twentieth Century Fox Film Corp.*, 14 F. Supp. 2d 1174, 1181 (C.D. Cal. 1998), *aff'd*, 212 F.3d 1159 (9th Cir. 2000).

This analysis is supported by the rules promulgated to implement the ADA: the published regulations that pertain to places of entertainment or exhibition such as stadiums, theaters and concert halls focus on the public areas of these facilities, not the places to which the public does not have access (*e.g.*, the stage or the backstage area). *See* 28 C.F.R. § 36.308 (1999) (application of Title III to seating in assembly areas). This is

entirely consistent with the overall purpose of Title III of the ADA which was to insure that "public" spaces are accessible to the disabled — not to regulate the entirely private areas and activities to which the public does not have access. *See* 28 C.F.R. Pt. 36, App. B at 616.[7]

To accept the Ninth Circuit's conclusion, unmoored to the statutory text, that if a facility is deemed to be a place of entertainment or exhibition, then *all* aspects of the facility are places of public accommodation, would effect a dramatic expansion of the scope of Title III for which there is no warrant in the statutory language or in its lengthy legislative history. It would mean, for example, that *all* aspects of museums, stadiums, and theaters — back offices, storage areas, decisions about what scenery to use or where to place it — would be covered under the public accommodation provision of Title III. But these areas clearly do not fall within the functional definition a place of public accommodation (*i.e.*, they are not places of entertainment or of retail sales).

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[7] The Preamble to the Title III regulations provides:

> Section 36.102(b)(2) emphasizes that the general and specific public accommodations requirements of subparts B and C obligate a public accommodation only with respect to the operations of a place of public accommodation. This distinction is drawn in recognition of the fact that a private entity that meets the regulatory definition of public accommodation could also own, lease or lease to, or operate facilities that are not places of public accommodation. *The rule would exceed the reach of the ADA if it were to apply the public accommodations requirements of subparts B and C to the operations of a private entity that do not involve a place of public accommodation.*

28 C.F.R. Pt. 36, App. B at 616 (emphasis added).

The expansive interpretation of Title III adopted below is contrary to the functional statutory test for determining what qualifies as a place of public accommodation. Moreover, it would represent an unprecedented governmental incursion into the rules for and management of professional sports competition previously left to the unfettered judgments of the professional sports leagues and sanctioning bodies. If Congress had meant to make professional sports competitions subject to the ADA in the way the Ninth Circuit has, surely it would have said so, and the legislative history would have so reflected.

Accordingly, for these reasons and the reasons articulated by the PGA TOUR, the Ninth Circuit erred in concluding that a professional golf tournament is a place of public accommodation.

CONCLUSION

For the reasons expressed above, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

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PGA TOUR, INC.,

Petitioner,

v.

CASEY MARTIN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE UNITED STATES GOLF ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether Title III of the Americans With Disabilities Act, 42 U.S.C. § 12101, *et seq.*, regulates standards established for competitors (here, professional golfers) in athletic competitions held at places of public accommodation.

2. Whether, if so, Title III requires professional sports organizations to grant selective waivers of their substantive rules of athletic competition in order to accommodate disabled competitors.

RULE 29.6 STATEMENT

Amicus United States Golf Association is a private, not-for-profit association of member golf clubs and golf courses.

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INTEREST OF THE AMICUS CURIAE[1]

By the common and voluntary consent of the golf community, amicus United States Golf Association ("USGA") is regarded as the governing body of golf within the United States. The USGA is concerned with virtually every aspect of the game of golf, especially preserving the integrity of the game and the conditions under which it is played. Among other things, the USGA formulates and issues the Rules of Golf. Petitioner PGA Tour is a separate entity (unrelated to the USGA) that conducts a series of professional golf tournaments each year. Petitioner voluntarily follows the USGA's Rules of Golf.

Each year, the USGA conducts national championships in each of thirteen designated categories (*e.g.*, U.S. Open, U.S. Women's Open, U.S. Senior Open, U.S. Amateur). Among the many professional and amateur golf competitions held each year in the United States, the USGA's championships are unique. There is only one national championship annually for each category of competitors, and the rules of competition for each championship are uniform for all competitors.

The U.S. Open is the national championship of golf in the United States, and, as the Seventh Circuit noted in a case similar to this one, it is by "consensus * * * the greatest test in golf." *Olinger* v. *USGA*, 205 F.3d 1001, 1003 (2000), petition for cert. filed , 69 U.S.L.W. 3235 (U.S. Sept. 20, 2000) (No. 00-434). The USGA selects difficult golf courses for the U.S. Open, and compounds the difficulty by making the course conditions extremely challenging. Moreover, because the U.S. Open is always held in June, "Open week is very often hot and humid, the pressure builds each day, and every mistake is magnified, especially on Sunday afternoon," when the final round is played (unless there is a tie, which necessitates a playoff on Monday).

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court. This brief was not written in whole or in part by counsel for a party, and no person or entity other than the amicus curiae has made a monetary contribution to the preparation and submission of this brief.

JOHN FEINSTEIN, A GOOD WALK SPOILED 333 (1995). "It is often said that the toughest eighteen holes in golf are the last eighteen at a U.S. Open," because "[t]he combination of the heat, the rough, the greens, and the pressure leaves everyone drained even before the last round begins. Once it starts, it only gets worse." *Id.* at 352. In 31 of the 100 U.S. Opens played to date, two or more competitors were tied at the end of regulation play, so that a playoff was needed to determine the champion. Twenty-five other U.S. Opens have been won by a single stroke.

The U.S. Open is not a mere shot-making contest. Rather, at its core, it is athletic competition at the highest level. Walking the course is (and always has been) a condition of the competition in the U.S. Open and its Qualifyings; players have always walked during the competition, since the first U.S. Open in 1895.[2] The USGA requires the competitors in the U.S. Open (and in ten of its twelve other national championships) to walk the course because physical endurance and stamina are very important parts of the test to which the competitors are subjected in championship-level golf competitions.[3]

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[2] After the Oregon magistrate judge ruled in favor of respondent, the USGA, acting on an *ad hoc* basis through its Championship Committee, waived the walking requirement for respondent in the U.S. Open and its Qualifyings during the pendency of this case. The USGA chose this course of action out of deference to the magistrate judge's ruling. Although the ruling was not legally binding on it, the USGA believed that respect for the judicial system made voluntary deference appropriate pending further review. Except for this one instance, the USGA has never granted an individual waiver of the rule requiring walking during the U.S. Open and its Qualifyings.

[3] The USGA has permitted competitors to use golf carts in the Senior Amateur and the Senior Women's Amateur championships because of the limited availability of caddies during the school year (when those events are played) and the age of the competitors. All of the competitors in those two championships are allowed to use carts,

(continued...)

By virtue of its status as the governing body of golf in the United States, the USGA has a significant interest in the outcome of this case. The USGA's interest is heightened by its own involvement in litigating the very questions that are presented in this case. In *Olinger*, a disabled professional golfer sued the USGA, seeking to use a golf cart in the U.S. Open and its Qualifyings. The district court held that the USGA need not allow Olinger to use a golf cart, because doing so would fundamentally alter the nature of the competition and would impose an undue administrative burden on the USGA. *Olinger* v. *USGA*, 55 F. Supp. 2d 926 (N.D. Ind. 1999). The Seventh Circuit affirmed. *Olinger* v. *USGA*, 205 F.3d 1001 (7th Cir. 2000). Olinger then filed a petition for a writ of certiorari, in which the USGA acquiesced. That petition remains pending. In addition, in May 2000 (after the Ninth Circuit and the Seventh Circuit issued their respective decisions), another disabled professional golfer sued the USGA, seeking to use a golf cart in the U.S. Senior Open and its Qualifying. *Jones* v. *USGA*, No. A-00-CA-278 JN (W.D. Tex. Aug. 30, 2000) (granting permanent injunction compelling USGA to permit plaintiff to use a golf cart), appeal pending (5th Cir. No. 00-50850).

The USGA receives applications from eligible golfers for each of its national championships. This year, the USGA received more than 8,400 applications for the U.S. Open, more than 3,000 applications for the U.S. Senior Open, and approximately 26,000 applications for its other eleven national championships combined. Most of the applicants for the U.S. Open and the U.S. Senior Open competed in Local and/or Sectional Qualifying for an opportunity to earn one of the non-exempt places in a field of 156 competitors. (Slightly more than one-third of the competitors in the field for the U.S. Open and the U.S. Senior Open are exempt from qualifying, based on past

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[3] (...continued)
because uniform rules are necessary for fair competition.

success as measured by published criteria.) For the U.S. Open, Local Qualifying takes place in mid-May, with one 18-hole round at each of nearly 100 qualifying sites around the country. Of the more than 8,000 competitors who participate in Local Qualifying, approximately 750 advance to Sectional Qualifying, which is conducted at 12 sites across the country in June; each competitor in Sectional Qualifying plays 36 holes in one day.

Moreover, because nearly 40,000 applicants seek entry into the USGA's national championships each year, the USGA would face an enormous administrative burden if the Ninth Circuit's ruling were upheld. Cardiologist Dr. James Rippe, founder and director of the Center for Clinical and Lifestyle Research and one of the nation's leading experts on the physiology of walking, testified in *Olinger*. He analyzed two hypothetical comparable golfers, one using a golf cart and the other walking, under conditions of heat and humidity analogous to those experienced in championship-level competitions. Dr. Rippe determined that the competitor who walked would expend more calories and suffer greater degradation of hand-eye coordination, dexterity, cognitive skills, and judgment than the one who used a golf cart, and that increases in heat, humidity, or hills would increase the physiological stress on the walker. Dr. Rippe's uncontroverted testimony also demonstrated that the specific inquiry required by the Ninth Circuit is literally impossible to perform: the only way to determine whether a particular individual competitor gains an advantage by using a golf cart is to run a battery of tests with that individual and his clone.[4] That

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[4] Dr. Rippe did not testify in *Martin*. Moreover, in *Olinger*, the district court excluded the proffered testimony of Dr. Gary Klug, the key expert on whose testimony the Oregon magistrate judge and the Ninth Circuit relied in ruling in favor of Martin. The district court excluded Dr. Klug's contemplated testimony regarding the physiological effects of walking versus using a golf cart as unreliable, under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), (continued...)

manifestly cannot be done. Consequently, if the Ninth Circuit's decision is upheld, the entities conducting championship-level athletic competitions will be forced to render scientific judgments that the best trained scientists are not competent to make, and federal courts will be forced to review those judgments.

SUMMARY OF ARGUMENT

I. The threshold question in this case is whether Title III of the ADA applies to the rules of competition in championship-level golf competitions. Because there is not even a hint in the text or the legislative history of the ADA that Congress intended Title III to apply to championship-level athletic competitions, respondent has seized on the location of the competition — a golf course — to argue that the rules of competition are subject to Title III because the statute lists a "golf course" as a "place of public accommodation." But, as demonstrated below, a golf course is not a "place of public accommodation" at all times and for all purposes. Respondent does not seek access to the golf courses used in PGA Tour competitions as a spectator, or as a person playing a casual round of golf. To the contrary, respondent asserts that the PGA Tour must make an exception to the uniform rules of its competitions so that he may use a golf cart. Title III does not apply in this circumstance, because neither the competitions themselves, nor the competition areas of the golf courses used in those competitions, are "place[s] of public accommodation."

Title III of the ADA lists twelve categories of "place[s] of public accommodation," none of which includes the competition areas of championship-level golf competitions. The competitors in championship-level golf competitions are not using the golf courses as "place[s] of exhibition or entertainment" (42 U.S.C.

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[4] (...continued)
and *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137 (1999) — a case decided after the district court proceedings in the present case, but before the USGA moved to exclude Dr. Klug's proffered testimony in *Olinger*. See *Olinger* v. *USGA*, 52 F. Supp. 2d 947 (N.D. Ind. 1999).

§ 12181(7)(C)), "place[s] of exercise or recreation" (*id.* § 12181(7)(L)), or places of any other category covered by Title III. The mention of golf courses in 42 U.S.C. § 12181(7)(L) does not require the application of Title III to the *competition* areas of golf courses during championship-level competitions. This Court construes terms in a list according to their shared attributes, "to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). Here, Congress has identified the shared attribute that must guide construction of the statute: only a "place of exercise or recreation" (whether listed or unlisted) is covered.

To be sure, a golf course is covered by the ADA on days when golfers are using it as a "place of exercise or recreation." But during the U.S. Open or a PGA Tour event, the competition areas of the golf course are used for championship-level competition, with large amounts of prize money at stake. Title III does apply to the *spectator* areas of a championship-level golf competition, because those areas (*i.e.*, the areas outside the gallery ropes that separate the spectators from the competitors) properly may be described as "place[s] of exhibition or entertainment." But none of the categories of places listed in Title III encompasses the *competition* areas inside the gallery ropes.

As the Seventh Circuit explained in *Olinger*, under the Justice Department regulations implementing Title III, "an entity may simultaneously be both a place of public accommodation and a place that is not fully subject to Title III — in other words, a 'mixed use' facility." 205 F.3d at 1004. The regulations provide that "to the extent that a mixed use facility 'is not open to the general public,' it 'is not subject to the requirements for public accommodations.'" *Ibid.* (quoting 28 C.F.R. ch. 1, pt. 36, App. B, at 624). Just as "in a large hotel that has a separate residential apartment wing, the residential wing would not be covered by the ADA," 28 C.F.R. ch. 1, pt. 36, App. B, at 623, the golf courses used in championship-level competitions are mixed-use facilities: the competition areas, from which the public is excluded and to which Title III does

not apply, are a private enclave that is separate from the place of public accommodation subject to Title III (the spectator areas).

II. Even if Title III extends to the competition areas of championship-level athletic competitions, the statute does not require the PGA Tour or the USGA to grant a selective waiver of the uniform rule that all competitors must walk the course in championship-level competitions. Title III does not require entities to make accommodations that would "fundamentally alter the nature of" their enterprise (42 U.S.C. § 12182(b)(2)(A)(ii)), or that would impose an "undue financial and administrative burden" (*Olinger*, 205 F.3d at 1006 (citing *School Bd.* v. *Arline*, 480 U.S. 273, 287 n.17 (1987), and other authorities)). Respondent seeks an accommodation that would do both. The relevant enterprise here is championship-level golf competition. Skilled shotmaking, physical endurance and stamina, and the ability to overcome fatigue are fundamental to that competition. A set of rules, applied uniformly to all competitors, also is fundamental to the integrity of the competition.

The USGA and the PGA Tour have determined, reasonably and in good faith, that requiring all competitors to walk the course best accomplishes the objective of creating a rigorous and objectively fair championship-level golf competition. The Court should defer to that rational determination. See, *e.g.*, *NCAA* v. *Board of Regents*, 468 U.S. 85, 101-02 (1984); *Brookins* v. *International Motor Contest Ass'n*, 219 F.3d 849, 853 (8th Cir. 2000); *Gunter Harz Sports, Inc.* v. *United States Tennis Ass'n*, 665 F.2d 222, 223 (8th Cir. 1981).

Even if it were theoretically possible to determine accurately which competitors would gain an unfair advantage over the rest of the field by being allowed to use a cart — and it is not — a court-imposed mandate requiring such determinations would impose an extremely heavy burden. Amicus USGA, for example, receives a total of almost 40,000 applications every year for the thirteen national championships that it conducts annually. The USGA is not equipped to undertake the medical

evaluations that would be required to process individual waiver requests from even a small fraction of those applicants, and (as the *Olinger* courts held) the ADA does not require that the USGA "'develop a system and a fund of expertise'" to do so. *Olinger*, 205 F.3d at 1007 (quoting district court opinion).

III. Championship-level golf is the context in which this case arises, but this Court's decision undoubtedly will have broad ramifications for all championship-level athletic competitions. In holding that the ADA requires the PGA Tour to grant an individual waiver of a substantive rule of its competitions, the Ninth Circuit has extended the reach of the ADA radically. There is not even a hint in the text, history, or purposes of Title III that Congress intended that statute to apply to competitors in championship-level athletic competitions. At their core, those competitions test the ability of people of different physical abilities to compete against each other under uniform rules. Equalization of physical attributes cannot be the guiding maxim for championship-level athletic competitions. The very purpose of such competitions is to ascertain, recognize, and reward physical excellence in the skills being tested. If the Ninth Circuit's decision is upheld, federal courts will be called on in myriad contexts to make the kinds of determinations that not even physicians, much less sports governing bodies, are capable of making with any degree of confidence, let alone precision. There is no reason to inject the federal judiciary into the micromanagement of championship-level athletics, because there is no evidence that Congress intended such a result.

ARGUMENT

I. TITLE III OF THE ADA DOES NOT APPLY TO THE SUBSTANTIVE RULES OR THE COMPETITION AREAS OF CHAMPIONSHIP-LEVEL ATHLETIC COMPETITIONS.

A. Initially, this Court must determine whether Title III of the ADA applies to the substantive rules, or the competition areas, of championship-level golf competitions. "Congress enacted the ADA to ensure that individuals with disabilities

fully enjoy the goods, services, privileges, and advantages available indiscriminately to other members of the general public." *Olinger*, 205 F.3d at 1004; accord *Carparts Distrib. Ctr., Inc.* v. *Automotive Wholesaler's Ass'n*, 37 F.3d 12, 20 (1st Cir. 1994). The ADA's mandate extends to three broad, yet distinct, areas: employment (Title I), public services (Title II), and places of public accommodation (Title III). This case involves only Title III.

Title III provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). The text of the statute, its implementing regulations, and the case law all help in resolving the question whether, and to what extent, Title III applies to the substantive rules, or to the competition areas, of a championship-level golf competition.

The ADA defines the following entities as "place[s] of public accommodation" under Title III (42 U.S.C. § 12181(7)):

> (A) an inn, hotel, motel, or other place of lodging * * *;
> (B) a restaurant, bar, or other establishment serving food or drink;
> (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
> (D) an auditorium, convention center, lecture hall, or other place of public gathering;
> (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
> (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;
(H) a museum, library, gallery, or other place of public display or collection;
(I) a park, zoo, amusement park, or other place of recreation;
(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

None of these categories even remotely suggests that Congress intended Title III to apply to the substantive rules, or the competition areas, of championship-level athletic competitions. Indeed, only two categories conceivably could apply to *any* aspect of a championship-level golf competition such as the U.S. Open or a PGA Tour event. Title III applies to some venues that are sometimes used to conduct championship-level athletic competitions — including gymnasiums, bowling centers, and golf courses — when those venues are used as "place[s] of exercise or recreation." 42 U.S.C. § 12181(7)(L). But the mere reference to a "golf course" in this subsection does not mean that Title III requires the PGA Tour or the USGA to make an exception to the uniform rules of a championship-level golf competition. Although a golf course at which a U.S. Open or a PGA Tour event is played may be a place of "exercise or recreation" during most of the year, it is *not* such a place on the days when it is being used for the conduct of the U.S. Open or a PGA Tour event. On those days, the competitors (including respondent) are not using the course to play a casual round of golf. Rather, they are using the course to compete for a championship, and for very substantial amounts of prize money. The fact that the competition takes place on a golf course, where

spectators are present, does not convert the competition itself, or the competition areas of the golf course, into a "place of public accommodation."

This case would be open and shut if subsection (7)(L) referred to "a gymnasium, health spa, bowling alley, golf course, or other place *to the extent that it is used as a place* of exercise or recreation." Although the italicized words do not appear in the statute, settled principles of statutory construction counsel that the statute should be so interpreted. "The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied * * * to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). With or without invoking the Latin phrase, this Court has used that principle to give limiting constructions to such broad and seemingly unqualified terms as "injunction," "manipulative," and "any plan, fund, or program * * * maintained for the purpose of providing * * * vacation benefits."[5]

The Court's technique in interpreting statutory lists is to determine the shared attribute of the items in the list: "That several items in a list share an attribute counsels in favor of

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[5] *Third Nat'l Bank* v. *Impac Ltd.*, 432 U.S. 312, 322-323 & n.16 (1977) (preliminary injunction against bank's foreclosure on real property was not an "injunction" within the meaning of a statute prohibiting an "attachment, injunction, or execution" against a national bank); *Schreiber* v. *Burlington Northern, Inc.*, 472 U.S. 1, 8 (1985) (action that allegedly distorted the market for a stock was not, in the absence of misrepresentation or nondisclosure, "manipulative" within the meaning of a statute prohibiting "fraudulent, deceptive, or manipulative acts or practices"); *Massachusetts* v. *Morash*, 490 U.S. 107, 114-115 (1989) (policy of paying discharged employees for unused vacation time is not a "plan, fund, or program * * * maintained for the purpose of providing * * * vacation benefits"). *Morash* reiterated that the Court is not "guided by a single sentence or member of a sentence" in a statute. *Id.* at 115 (quoting *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 51 (1987)). See also *Dole* v. *Steelworkers*, 494 U.S. 26, 36 (1990).

interpreting the other items as possessing that attribute as well." *Beecham* v. *United States*, 511 U.S. 368, 371 (1994). Here, Congress itself has identified the shared attribute: subsection (7)(L) is intended to reach only "place[s] of exercise or recreation." When respondent is competing for prize money and a championship, he is not using the golf course for "exercise or recreation."

Title III also applies to "place[s] of exhibition or entertainment," and thus covers persons who attend sporting events as spectators. 42 U.S.C. § 12181(7)(C). But even if a golf course being used for a championship-level competition is a place of "exhibition or entertainment" for the spectators, that is not its function *for the competitors*. The spectators are separated from the competitors by the gallery ropes, and the spectators are not permitted to enter the competition areas of the golf course — any more than they are permitted on stage during the performance of a concert or an opera. The area inside the ropes is off limits to spectators. This, of course, is true with respect to any championship-level athletic competition or professional entertainment — whether it is an NFL game at Texas Stadium, a baseball game at Wrigley Field, a basketball game at Madison Square Garden, or a performance of *Ariadne auf Naxos* at the Kennedy Center. Title III does not require a change in the structure of a theatrical performance or in the rules of a competition. Even if the Folger Elizabethan Theatre must install ramps so that patrons in wheelchairs may view a performance, Title III does not require the theater to omit the sword fight from *Hamlet* in order to accommodate an actor in a wheelchair. Likewise, Title III does not affect the criteria by which the actors are selected or the requirements of the roles that they perform. During a PGA Tour event, respondent is using the competition areas of golf courses not as a "place of exhibition or entertainment," but rather as a place of championship-level athletic competition. Consequently, subsection (7)(C) does not apply here.

B. The Seventh Circuit properly viewed with skepticism the concept that the inclusion of a "golf course, or other place of exercise or recreation," in the statutorily enumerated categories

of places of public accommodation evinced Congress's intent to extend the ADA to the competition areas of championship-level athletic competitions. As the Seventh Circuit noted, under the Justice Department regulations implementing Title III, "an entity may simultaneously be both a place of public accommodation and a place that is not fully subject to Title III — in other words, a 'mixed use' facility." 205 F.3d at 1004. In addition, as the Seventh Circuit further observed, the Justice Department has determined that, "to the extent that a mixed use facility 'is not open to the general public,' it 'is not subject to the requirements for public accommodations.'" *Ibid.* (quoting 28 C.F.R. ch. 1, pt. 36, App. B, at 624).

Although the Seventh Circuit ultimately decided *Olinger* without resolving this issue, both the regulations implementing the ADA and the decisions applying the ADA support the proposition that a golf course is a mixed-use facility when it is used for a championship-level competition. The regulations — which are entitled to controlling weight unless they are arbitrary and capricious (*Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 844 (1984)) — provide expressly for a private enclave in a place of public accommodation. Under Title III, "a private entity that meets the regulatory definition of public accommodation could also own, lease or lease to, or operate facilities that are not places of public accommodation." 28 C.F.R. ch. 1, pt. 36, App. B at 616. As the regulations also make clear, the mandates of Title III "obligate a public accommodation only with respect to the operations of a place of public accommodation." *Ibid.*

The Justice Department regulations provide examples of "[m]any facilities" that are classified as "mixed use" facilities. 28 C.F.R. ch. 1, pt. 36, App. B at 623. For example, "in a large hotel that has a separate residential apartment wing, the residential wing would not be covered by the ADA." *Ibid.* If the apartment wing in a hotel is closed to the general public, that wing is not subject to Title III, even though the rest of the hotel is. *Ibid.* Such a facility is predominantly a place of public accommodation (the hotel) containing a private enclave ("the residential apartment wing") that is not covered by Title III.

Other examples drawn from the same regulations further illuminate the commonsense proposition that a single facility can be a place of public accommodation for some purposes and private for other purposes. The regulations state that a movie studio that provides public tours is a mixed-use facility:

> If a tour of a commercial facility that is not otherwise a place of public accommodation, such as * * * a movie studio production set, is open to the general public, the route followed by the tour is a place of public accommodation and must be operated in accordance with the rule's requirements for public accommodations. The place of public accommodation defined by the tour does not include those portions of the commercial facility that are merely viewed from the tour route. * * * If the tour is not open to the general public, but rather is conducted, for example, for selected business colleagues, partners, customers, or consultants, the tour route is not a place of public accommodation and the tour is not subject to the requirements for public accommodations.

Id. at 624. The upshot of these regulations, of course, is that only those portions of a mixed-use facility that are open to the public come within the scope of Title III of the ADA.

C. Notwithstanding the plain text and commonsense construction of these regulations, the Justice Department's amicus brief to the Ninth Circuit contended that "there is no basis for carving out a 'private' zone of a place of public accommodation that would fall outside the coverage of Title III." Brief for the United States as Amicus Curiae in *Martin* v. *PGA Tour, Inc.*, No. 98-35309, at 12 (9th Cir.) ("DOJ 9th Cir. Br."). That brief asserted that, "[a]lthough the regulations provide that portions of a non-covered entity may be covered by Title III, no such regulations provide that portions of a covered entity may be exempt from coverage." *Id.* at 23-24. The brief also asserted that the hotel "facility" described in the regulations "is really two separate entities; they are not 'zones' of a single place of public accommodation." *Id.* at 23-24 n.16.

The Justice Department's effort, in effect, to promulgate new regulations in a brief cannot be credited. Informal agency

interpretive positions are not entitled to *Chevron*-style deference. See *Christensen* v. *Harris County*, 120 S. Ct. 1655, 1662 (2000) ("[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all * * * lack the force of law," unlike agency interpretations "arrived at after, for example, a formal adjudication or notice-and-comment rulemaking"). *Christensen* makes clear that even if an agency is interpreting its own regulation, the agency's interpretation is not entitled to deference if the regulation is clear. To the contrary, if the regulation is clear, it must govern. Any other rule would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Id.* at 1663 (citing *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997)).

As Chief Judge Posner has written, a position advanced in a brief "cannot claim much democratic legitimacy to set over against the intent of Congress so far as it can be gleaned from the usual interpretive sources," even when the agency has *not* formally addressed an issue on which it takes a position in litigation. *Doe* v. *Mutual of Omaha Ins. Co.*, 179 F.3d 557, 563 (7th Cir. 1999), cert. denied, 120 S. Ct. 845 (2000). The agency's litigation position is entitled to even less consideration when it contradicts the plain meaning of a regulation and the construction of a statute that is strongly indicated by settled canons. Even though (i) the Justice Department's own regulations refer to a "residential apartment wing" of a large hotel and (ii) the plain and ordinary meaning of the term "wing" is a "*part of a building*, etc., extended in a certain direction" (THE OXFORD DESK DICTIONARY AND THESAURUS 923 (American ed. 1997) (emphasis added)), the Department's brief in the Ninth Circuit insisted that the "facility is really two separate entities." DOJ 9th Cir. Br. 24 n.16. This interpretation cannot be squared with the regulations as written. If the Department wishes to rewrite the applicable regulations, it must use the required formal procedures to do so; only then can courts be certain that the new regulatory commands are not merely the agency's "convenient litigating position" (*Bowen* v. *Georgetown Univ. Hosp.*,

488 U.S. 204, 213 (1988)), but instead are the product of its "fair and considered judgment"(*Auer*, 519 U.S. at 462).[6]

D. In view of the plain text of the Justice Department regulations, it is not surprising that case law under the ADA recognizes that a mixed-use facility can exist. For example, in *Jankey* v. *Twentieth Century Fox Film Corp.*, 14 F. Supp. 2d 1174 (C.D. Cal. 1998), aff'd, 212 F.3d 1159 (9th Cir. 2000), the plaintiff sued a movie studio under the ADA, alleging that certain facilities at the studio's production lot were inaccessible to disabled persons. The court held that the production lot itself, a commissary, a store, and an automated teller machine located on the lot were *not* "places of 'public accommodation.'" *Id.* at

[6] In addition to attempting to rewrite its own regulations, the Justice Department tried to justify its radical proposed extension of Title III by invoking "the ADA's broad remedial purpose and the well-settled rule that such statutes are interpreted expansively." DOJ 9th Cir. Br. 19; see also *id.* at 23 (attempting to justify the Department's argument that a predominantly private place may have a public enclave, while a predominantly public place may not have a private enclave, on the ground that such a conclusion "is fully consistent with the broad reach of a remedial statute"). That "rule" — which this Court has described as the "last redoubt of losing causes" (*Office of Workers' Comp. Programs* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135 (1995)) — has no application if the statute and the regulations are clear. Indeed, this Court has stressed that "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987); see also *East Bay Mun. Util. Dist.* v. *Department of Commerce*, 142 F.3d 479, 484 (D.C. Cir. 1998) ("We have recently expressed our general doubts about the canon that 'remedial statutes are to be construed liberally,' since virtually any statute is remedial in some respect."); *Bushendorf* v. *Freightliner Corp.*, 13 F.3d 1024, 1026 (7th Cir. 1993) ("Remedial statutes like other statutes are typically compromises, and a court would upset the compromise if it nudged such a statute closer to the victim side of the line than the words and history and other indications of the statute's meaning pointed").

1184. In reaching that conclusion, the court quoted extensively from the Justice Department regulations, observing that

> "[m]ixed use" facilities can also exist, consisting of an exempt facility of which a portion is a public accommodation. That portion, and only that portion, will therefore be subject to the ADA. * * * Conversely, a public accommodation may contain within itself a portion which is an "exempt area."

Id. at 1179. The court then addressed the question whether the facilities to which the plaintiff sought access were "'available indiscriminately to other members of the general public,' as required for a public accommodation" (*id.* at 1181), and answered in the negative in each instance. *See id.* at 1181-84.[7]

Similarly, in *Louie* v. *Ideal Cleaners*, 1999 WL 1269191 (N.D. Cal. Dec. 14, 1999), the court recognized that the "mixed use" facility concept encompasses private enclaves within a public accommodation as well as public enclaves within an otherwise private facility. In *Louie*, the plaintiffs sought access to the restroom at a dry cleaning establishment. The court stated that "[i]t is undisputed that the dry cleaners itself is a public accommodation" under § 12181(7)(F) of the ADA, but ruled that, "[u]nder the 'mixed use' analysis of *Jankey*, the employee-only restroom in the back of the dry cleaners is not a public accommodation even though the dry cleaners itself is a public

[7] In addition to being fully consistent with the ADA and its implementing regulations, the *Jankey* court's holding — that a primarily exempt facility with a limited public component and a primarily public facility with a limited private component are flip sides of the same coin for purposes of Title III analysis — also comports with common sense. Whether the public/private division within a given mixed-use facility is 60/40, 40/60, or any other ratio does not change the overarching principle under the ADA, pursuant to which compliance is mandated "only with respect to the operations of a *place* of *public* accommodation." 28 C.F.R. § 36.102(b)(2) (emphasis added). For a championship-level golf competition, the area from which spectators are excluded often will be larger than the area that is open to spectators.

accommodation." 1999 WL 1269191, at *1. As the court noted, "the restrooms are not made available to the public and are only for the use of employees." *Id.* at *2.

E. Under the principles discussed above, the competition areas of a championship-level athletic competition are not a place of public accommodation within the meaning of Title III. At a championship-level golf competition, there is a clear delineation between the competition areas and the spectator areas. Spectators are not allowed inside the gallery ropes that separate the competitors, and the competition areas, from the spectators. Because access to the competition areas is not "available indiscriminately to * * * members of the general public," *Olinger*, 205 F.3d at 1004, those areas are not subject to Title III.

In rejecting petitioner's argument that the golf courses used in PGA Tour events are mixed-use facilities, the Ninth Circuit analogized the competition for entry to the field in a PGA Tour event to the competition for admission to elite private universities. Pet. App. 7a. On the basis of that comparison, the Ninth Circuit concluded that "the fact that users of a facility are highly selected does not mean that the facility cannot be a public accommodation." *Ibid.* The Ninth Circuit's analysis was incomplete, however, because it failed to analyze the comparison in light of the language of Title III itself. Whether a particular facility is a public accommodation, a mixed-use facility, or a purely private facility is governed first and foremost by the relevant statutory language. Title III, by its terms, covers "secondary, undergraduate, or postgraduate private school[s], or other place[s] of education." 42 U.S.C. § 12181(7)(J). Just as golf courses are covered only as places of exercise or recreation, private schools are covered only as places of education. Thus, Title III applies unambiguously to students who seek access to private schools as a place of education, even if those students have been selected on the basis of rigorous criteria. However, the Ninth Circuit did not consider the possibility that, depending on the circumstances, a private school facility could be a mixed-use facility for ADA purposes — if, for example, it included both classrooms (which would be covered as "place[s] of education") and living quarters for faculty (which would not be covered). This configuration would be precisely analogous to the hotel with a private residential wing, or to a golf course with separate spectator areas and competition areas.

Moreover, the cases on which the Ninth Circuit based its holding that Title III applies to the competition areas of championship-level athletic competitions do not support that holding. In fact, *Independent Living Resources* v. *Oregon Arena Corp.*, 982 F. Supp. 698 (D. Or. 1997), modified, 1 F. Supp. 2d 1159 (D. Or. 1998) (cited at Pet. App. 5a), is fully consistent with the USGA's reading of Title III and its implementing regulations. In that case, the court held that executive suites in a sports arena were places of public accommodation. The executive suites, as the court recognized, are "merely an updated version of the 'box seats' that have long been available at many ballparks." *Id.* at 759. Such executive suites are used by spectators, not competitors, and thus are analogous to the spectator areas outside the ropes at the U.S. Open. The NCAA cases cited by the Ninth Circuit — *Bowers* v. *NCAA*, 9 F. Supp. 2d 460 (D.N.J. 1998), *Tatum* v. *NCAA*, 992 F. Supp. 1114 (E.D. Mo. 1998), and *Ganden* v. *NCAA*, 1996 WL 680000 (N.D. Ill. Nov. 21, 1996) (cited at Pet. App. 5a) — also are inapposite. Those cases concerned eligibility requirements, rather than conditions of a competition. The plaintiffs there sought waivers of threshold GPA or test score requirements, not changes in the actual rules of athletic competitions. In other words, those cases had nothing to do with what happened once the competitions began "inside the ropes." Respondent is eligible to compete under the same rules that apply to all of the competitors — and altering those rules for respondent's benefit would fundamentally alter the competition, as we show next.

II. PERMITTING AN INDIVIDUAL COMPETITOR TO USE A GOLF CART WOULD FUNDAMENTALLY ALTER THE NATURE OF A CHAMPIONSHIP-LEVEL GOLF COMPETITION.

A. Even where the ADA applies, it does not require a defendant to modify its "policies, practices, or procedures" if the proposed modification would "fundamentally alter the

nature of" the defendant's "goods, services * * * or accommodations." 42 U.S.C. § 12182(b)(2)(A)(ii). Thus, "the ADA does not require entities to change their basic nature, character, or purpose insofar as that purpose is rational, rather than a pretext for discrimination." *Olinger*, 205 F.3d at 1005.

The Ninth Circuit's approach to the fundamental alteration question is inherently flawed. The Ninth Circuit requires the PGA Tour to show that the level of fatigue that respondent would experience using a cart would be less than that experienced by hypothetical "able-bodied competitors" who walk the course. See Pet. App. 10a; see also *id.* at 36a. No other court of appeals has even remotely suggested that the ADA requires this type of purportedly precise calibration.

The Ninth Circuit's decision forces the PGA Tour to change its basic nature by applying different rules to different competitors in a championship-level golf competition. There is no statutory basis for the Ninth Circuit's determination that the PGA Tour must change its rules in a way that the PGA Tour reasonably believes would give one competitor an advantage over others. As Dr. Rippe, a nationally recognized expert in the physiology of walking, testified in *Olinger*, a competitor who uses a golf cart suffers less fatigue and less degradation of his small motor skills during a round of golf than a competitor who walks — and these advantages are magnified in hot, humid weather or on a hilly golf course. Moreover, the Ninth Circuit's approach is completely unworkable in practice, because it requires an entity conducting a championship-level golf competition to make scientific comparisons between (i) golfers with various disabilities and (ii) hypothetical "able-bodied competitors" — comparisons that highly credentialed scientists believe are literally impossible to make. As Dr. Rippe testified in *Olinger*, the only way to know for certain whether a disabled golfer would get a physiological advantage from using a golf cart would be to test the disabled golfer and his clone on a golf course, with one walking and the other using a cart. Neither the ADA nor any other law requires such an impossible inquiry. See *Perry* v. *Local Lodge 2569*, 708 F.2d 1258, 1262 (7th Cir. 1983) ("the law does not require the impossible"); cf. *Rosen* v. *Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996) ("Law lags science; it does not lead it").

B. As the *Olinger* courts correctly observed, the purposes underlying the rule requiring that all competitors walk the course in a championship-level golf competition are to inject stamina as an element of the competition and to preserve uniform rules for all competitors. See *Olinger*, 205 F.3d at 1006 (quoting district court opinion). It is clear that forcing the PGA Tour or the USGA to waive the walking requirement for selected competitors would fundamentally alter the nature of championship-level competitions. Most significantly, petitioner and the USGA have reasonably determined, in good faith, that a competitor who uses a golf cart might gain a substantial competitive advantage over a golfer who walks. The courts generally have permitted sports governing bodies "to create and define the competition" (*NCAA* v. *Board of Regents*, 468 U.S. 85, 101 (1984)), provided that they promulgate rules that are rational and not a pretext for unlawful activity. See, *e.g.*, *Brookins* v. *International Motor Contest Ass'n*, 219 F.3d 849, 853 (8th Cir. 2000) (noting that "the few courts to consider antitrust challenges to rules defining a sports activity have given the rule-makers considerable discretion to achieve their sporting objectives"); *Gunter Harz Sports, Inc.* v. *United States Tennis Ass'n*, 665 F.2d 222, 223 (8th Cir. 1981) (noting that governing body of tennis "legitimately functions * * * to ensure that competitive tennis is conducted in an orderly fashion and to preserve the essential character of the game as played in organized competition" and that its "regulation of racket characteristics is rationally related to these goals"). Such deference is entirely appropriate in the present context. As the Seventh Circuit held in *Olinger*, a competitor who uses a golf cart could obtain a "'tremendous advantage'" over a competitor who walks the course, and the riding golfer's advantage would be greater under certain conditions that frequently are present in championship-level golf competitions (heat, humidity, hilly terrain). 205 F.3d at 1006. In addition, the Ninth Circuit's approach injects an element of non-uniformity into what has always been a uniform set of rules for all competitors.

Championship-level golf, like all other championship-level athletic competitions, is designed to produce a champion from among a group of competitors who perform under exactly the same rules. For more than 100 years, the USGA has required the competitors in the U.S. Open to walk during each round, often for more than 4½ hours a day under a broiling sun, to make the ability to overcome fatigue an essential part of the gauntlet that the champion must endure. See Pet. App. 32a ("the purpose of the walking rule is to inject the element of fatigue into the skill of shot-making") (magistrate judge's opinion below); FEINSTEIN, A GOOD WALK SPOILED 332-33, 341-42 (discussing the brutal weather conditions during the 1994 U.S. Open at Oakmont, outside Pittsburgh); CURT SAMPSON, HOGAN 139-47 (1996) (describing Ben Hogan's victory in the 1950 U.S. Open even though Hogan was barely able to walk at times; before each round, Hogan had to soak in a tub of hot water and Epsom salts for an hour and wrap his legs from ankles to crotch in elastic bandages to minimize swelling, because of injuries that he had suffered in a near-fatal car accident).[8]

In holding that allowing an individual competitor to use a cart would "fundamentally alter the nature of" the U.S. Open, *Olinger*, 205 F.3d at 1005-07, the Seventh Circuit understood the critical importance of walking the course in championship-level golf, as a means of formulating an appropriately difficult test for determining the national champion and ensuring that the test is administered uniformly to all competitors. In particular, the Seventh Circuit agreed with the commonsense conclusion that someone who walks for 4½ hours on a hot, humid day will

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[8] The amount of time spent in hot, humid conditions is greater if the golfers are required to play more than 18 holes in a day, as they must during sectional qualifying for the U.S. Open (36 holes in one day) or if weather problems delay play. See Gary Reinmuth, *Struggle to Make Field Goes Overtime*, CHICAGO TRIBUNE, July 4, 2000, § 4, at 5 (describing a golfer who had to play 34 holes on the second day of the 2000 U.S. Open).

be more fatigued than someone who rides in a cart. The court found "particularly persuasive" the experience of Ken Venturi, a professional golfer who for the last 31 years has been the golf analyst for CBS Sports. *Id.* at 1006. In 1964, Venturi won the U.S. Open in "grueling conditions" that included near-100 degree temperatures and 97 percent humidity. *Ibid.* As Venturi testified in *Olinger*, he combined a regimen of practice shots with walking up to five miles a day in training for the U.S. Open — and hitting practice shots at the end of the day, when he was most fatigued. Despite this preparation, Venturi "battl[ed] dehydration" in the "stifling heat and humidity." *Ibid.* Nevertheless, "Venturi walked the course and, on the verge of collapse, won the tournament." *Ibid.* Venturi testified that any competitor who would have been permitted to use a cart in those conditions would have had a "'tremendous advantage.'" *Ibid.* The Seventh Circuit concluded that Venturi's experience, "by itself, supports the golf community's insistence that all players play all tournaments under the same conditions and rules." *Ibid.*

The effect of heat and humidity is especially important because of the narrow margins that often separate competitors. In 30 of the 100 U.S. Opens played to date, two or more competitors were tied at the end of regulation play. Twenty-five other U.S. Opens have been won by a single stroke. Even for those who do not win, the difference of one stroke in the final standings can be worth tens of thousands of dollars.[9]

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[9] Respondent's first victory on the Nike Tour illustrates why granting individual requests for waivers of the substantive rules of a competition leads down a slippery slope. Respondent used a golf cart in winning the 1998 Lakeland Classic by a single stroke. The second-place finisher in that tournament was suffering from an ingrown toenail that caused him to suffer intense pain. He received novocaine shots the day before the tournament started. He had the toenail surgically removed the next day, and played the last two rounds of the tournament with the top of his golf shoe cut off. If that competitor had been permitted to use a golf cart, he might have improved his score by one or two strokes. See Matthew Kensky, *Casey Martin* v.

(continued...)

The Seventh Circuit properly concluded that the USGA's decision, for more than a century, to require walking as an essential element of the national championship makes sense in light of the "basic nature, character, [and] purpose" of the U.S. Open. 205 F.3d at 1005. The standards of the competition are exacting, and are enforced uniformly with respect to all competitors. This is entirely proper under the ADA. As the Seventh Circuit concluded, any competitor who is permitted to use a golf cart may gain a significant advantage over other competitors, and any such advantage would compromise the integrity of the entire endeavor.[10]

C. The *Olinger* court also observed, correctly, that "courts consistently have concluded that an accommodation is not reasonable if it imposes an undue financial and administrative burden." 205 F.3d at 1005-06 (footnote omitted); see also *Arline*,

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[9] (...continued)
PGA Tour, Inc.: Introducing Handicaps to Professional Golf by Widening the Scope of the ADA, 9 GEO. MASON U. CIV. RTS. L.J. 151, 163 & n.81, 187 (1998).

[10] Expert testimony supports that conclusion. In *Olinger*, Dr. Rippe, the founder of the leading walking research laboratory in the United States, testified extensively on the effects of allowing a waiver or modification of the rule requiring competitors to walk the course during a championship-level golf competition. See *Olinger*, 55 F. Supp. 2d at 935-36 (summarizing testimony). Dr. Rippe concluded that a competitor who is permitted to use a golf cart would have a substantial and unfair advantage over a competitor who walks the course. *Id.* at 935. Among other things, he found that the individual who is walking the course performs significantly more physiological work, and suffers greater cognitive and psychomotor fatigue, than the individual who uses a golf cart. *Ibid.* Dr. Rippe further testified that increased hills, humidity, or temperature would increase the differential in stresses affecting the walker and the rider. *Id.* at 936. In sum, as the *Olinger* district court found, "Dr. Rippe's report provides a strong basis to believe that as between two roughly similar golfers, the golfer who rides is likely to have some advantage when it comes to fatigue over the golfer who walks." *Id.* at 935-36.

480 U.S. at 287 n.17 (Rehabilitation Act case); *Buckles* v. *First Data Resources, Inc.*, 176 F.3d 1098, 1101 (8th Cir. 1999) (ADA case) ("an accommodation is unreasonable if it * * * 'imposes undue financial or administrative burdens'"); *Sandison* v. *Michigan High Sch. Athletic Ass'n*, 64 F.3d 1026, 1035 (6th Cir. 1995) (ADA case) ("It is plainly an undue burden to require high school coaches and hired physicians to determine whether [various] factors render a student's age an unfair competitive advantage. * * * It is unreasonable to call upon coaches and physicians to make these near-impossible determinations").

Applying these decisions, the lower courts in *Olinger* held that the ADA does not require the USGA to "'develop a system and a fund of expertise to determine whether a given applicant truly needs, or merely wants, or could use but does not need, to ride a cart to compete.'" *Olinger*, 205 F.3d at 1007 (quoting district court opinion). As the Seventh Circuit recognized, if the rule were modified to permit competitors to request waivers on an *ad hoc* basis, the USGA would be required to have a staff of medical specialists available to evaluate (for the U.S. Open alone) waiver requests from any of the more than 8,000 competitors at almost 100 qualifying sites across the country.

Moreover, even if the USGA had a large staff of medical specialists — which it does not — it would be impossible to draw the appropriate lines in evaluating the myriad disabilities that conceivably could be used to justify a particular competitor's request for permission to use a golf cart. Although "'temporary, non-chronic impairments of short duration, with little or no longterm or permanent impact, are usually not disabilities'" under the ADA (*Sanders* v. *Arneson Prods.*, 91 F.3d 1351, 1354 (9th Cir. 1996)), there are countless golfers and other professional athletes who very well might qualify as disabled under the ADA on the basis of their physical ailments. As the Sixth Circuit has held in similar circumstances (*Sandison*, 64 F.3d at 1035), no cadre of doctors and athletic officials can be expected to make the "near-impossible determinations" that would be required in deciding whether a waiver of the walking requirement would give a particular

competitor an unfair advantage, or merely would bring him up to parity with his competitors.

The Ninth Circuit, however, concluded that the individualized waiver determinations mandated by its decision in this case do not pose any administrative difficulty. Pet. App. 14a-15a. That conclusion is simply untenable. There is no way to calibrate how much of a disadvantage a particular competitor's disability creates, and correspondingly there is no way to determine whether an accommodation for that competitor's disability merely negates the effect of the disability, or in fact overcompensates that competitor. Consequently, tournament officials who are forced by the *Martin* decision to evaluate individual requests for the use of a golf cart will have to engage in a speculative exercise, regardless of the other variables that are present. The approach taken by the courts below in *Olinger* is far more realistic, and this Court should endorse that approach.

In addition to being wholly impracticable, the inquiry that tournament officials must follow under the Ninth Circuit's mandate undoubtedly will spawn frequent litigation.[11] PGA Tour competitor Ed Fiori has stated that he would like to use a cart because of his chronic back problems, and he "says there are 10 or 12 others who'd like to join him." Jeff Babineau, *Fiori Makes Cart Inquiry*, GOLFWEEK, Mar. 18, 2000, ¶ 1 (www.golfonline.com/news/golfweek/2000/march/fiori0318.html). When the field of possible plaintiffs is expanded from the 300 or so touring professionals with whom Fiori is familiar to the more than 8,400 entries for this year's U.S. Open, it is readily apparent that the number of competitors

[11] It is not surprising that the USGA had not received many requests for waivers of the walking rule before the *Martin* and *Olinger* cases. For many years, the application for entry into the U.S. Open has informed applicants that "[p]layers shall walk at all times during a stipulated round."

who may seek to use carts could be substantial.[12] It will not always be obvious whether a particular competitor suffers from a disability within the meaning of the ADA; doctors sometimes disagree on a diagnosis. And even the Justice Department has acknowledged that sometimes it will "be difficult to determine whether the requested accommodation, in view of the plaintiff's disability, would result in an unfair advantage." DOJ 9th Cir. Br. 35 n.22. Disagreements on these issues are inevitable, and if the Ninth Circuit's decision is affirmed each of those disagreements will have to be resolved by a court. In short, to the extent that the Ninth Circuit's decision compels the USGA (or any other entity conducting a championship-level athletic competition) to evaluate individual waiver requests on an *ad hoc* basis, the USGA and the federal courts will be forced to engage in an impracticable inquiry, seeking an unattainable answer.

* * *

The U.S. Open has long played a prominent role in American sports history. Until the golf cart controversy arose, exactly the same rules of competition have applied to all of the competitors in each U.S. Open since the championship was first held in 1895. Permitting *some* select golfers to use carts would "change[ ] the nature of professional golf tournaments forever." Robert S. Shwarts, *A Good Walk Spoiled: The 9th Circuit Improves Its Lie*, Mar. 23, 2000, ¶ 3 (www.lawnewsnetwork.com/opencourt/stories/A19345-2000Mar22.html). Moreover, the inability to determine accurately which arguably disabled golfers should be permitted to use a golf cart — and the

[12] Some 43 million Americans, roughly one in seven, have disabilities that are covered by the ADA. *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 484-486 (1999); 42 U.S.C. § 12101(a)(1). Even if the percentage of championship-level golfers who meet the statutory definition is much smaller, the number of disabled golfers wanting to use carts is likely to be considerable. This is especially true if one includes as potential litigants the golfers whose physical conditions are at (or outside) the margins of ADA coverage. When competitors in the U.S. Senior Open are considered, it is even more likely that many will seek to use carts, particularly in light of the *Jones* decision.

extraordinary burden of trying to make such determinations — may force golf's governing bodies to adopt a bright-line rule allowing all competitors to use golf carts. Of course, allowing *all* golfers to use carts because of the difficulty of comparing one claimed justification for a waiver of the walking rule against another claimed justification would be the most fundamental alteration of all. The ADA does not require either of those results. This Court should endorse the Seventh Circuit's conclusion, and reject the Ninth Circuit's.

III. THIS CASE HAS BROAD RAMIFICATIONS FOR OTHER CHAMPIONSHIP-LEVEL ATHLETIC COMPETITIONS.

The questions presented here concerning the scope of Title III have broad ramifications not only for golf, but for all championship-level athletic competitions. As several commentators have pointed out, the golf cart controversy litigated here and in *Olinger* has, for the first time, extended the reach of the ADA to the realm of championship-level sports. *E.g.*, Todd A. Hentges, *Driving in the Fairway Incurs No Penalty: Martin v. PGA Tour, Inc. and Discriminatory Boundaries in the Americans With Disabilities Act*, 18 LAW & INEQ. J. 131, 148 (Winter 2000) ("Although several spectators have requested that covered entities comply with the ADA's accessibility requirements with respect to watching professional sports, Casey Martin and Ford Olinger are the only two athletes to claim that the ADA should apply to the playing of professional sports"); W. Kent Davis, *Why is the PGA Teed Off at Casey Martin? An Example of How the Americans With Disabilities Act (ADA) Has Changed Sports Law*, 9 MARQ. SPORTS L.J. 1, 3 (Fall 1998) (noting that Martin's case is "the first to apply [the ADA] * * * to professional sports"). Prior ADA cases frequently have involved eligibility rules in scholastic and intercollegiate athletics, but none has involved an attempt by a professional athlete to obtain a waiver of a substantive rule of his or her sport. Unless this Court cabins the Ninth Circuit's impulse to extend the reach of the ADA to places that Congress never contemplated — to decide, without congressional warrant, that the disabled must be given a way to be competitive in events whose very purpose is to determine the most *physically able* competitors according to predetermined, uniformly applied rules of competition — then this case may prove to be a "watershed event" that "interject[s] the ADA into professional sports." *Id.* at 4; see also Dave Addis, *Can Allowances For Disabilities Work In Sports?*, VIRGINIAN-PILOT & LEDGER-STAR, JAN. 18, 1998, at J1 ("a precedent in Martin's case would become an immediate problem when applied to other professional sports, which is certain to happen in a society where pro-sports venues are drowning in dollars and lawyers").

A ruling that the ADA compels the modification of the basic, long-established rules of a championship-level sports competition would have repercussions far beyond golf. Olympic gold medalist Jackie Joyner-Kersee and tennis champion Jimmy Connors have asthma. Must they be permitted extra time between long jumps and tennis sets because asthma adversely affects their ability to recuperate? Must a biathlete with hypertension be permitted to take extra time between the long-distance skiing and the shooting competition?[13] A request by a competitor to modify the time rules in any of these championship-level athletic competitions on the basis of an asserted impairment of his or her ability to cope effectively with the physical stress of the competition — like respondent's request to use a golf cart in PGA Tour competitions — would eliminate an essential element of the competitions.

These examples highlight the fundamental tension between the ADA-based accommodation imposed by the Ninth Circuit in this case and the realities of championship-level athletic competitions. Athletic competition tests the ability of people with different physical abilities to compete against each other under uniform rules. Sometimes brute strength prevails. In other instances, stamina, guile, or luck accounts for the result. The point is that competitors try to play to their strengths and overcome their weaknesses, within the rules of the game. What-

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[13] To cite just one more example, must that biathlete be permitted to take drugs to combat hypertension, even if those drugs are otherwise banned as performance enhancing?

ever "fairness" may mean in other aspects of life — where, for example, it may be grossly unfair to treat one scientist or lawyer differently from another based on physical abilities, because physical abilities are not the relevant skills — "fairness" in championship-level athletic competitions ordinarily means that everyone competes under the same rules. Equality of opportunity is not the criterion of fairness in an athletic competition, because the very purpose of an athletic competition is to ascertain who is most physically excellent in the skills being tested. Modification of the rules to compensate for physical limitations is not a common feature of championship-level athletic competitions, in which the winners generally are those competitors who overcome whatever physical limitations they may have.[14]

The Seventh Circuit recognized this tension, and further understood that Congress enacted the ADA to ensure that disabled persons have access to places that are accessible "indiscriminately to other members of the general public" (*Olinger*, 205 F.3d at 1004), not to inject the federal judiciary into the micromanagement of championship-level athletic competitions. As the Seventh Circuit sensibly concluded, whether the rules of championship-level golf "should be adjusted to accommodate [the plaintiff] is best left to those who hold the future of golf in trust." *Id.* at 1007.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

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[14] The annals of sports history contain many examples in which disabled competitors have struggled to compete — sometimes with amazing success — under the uniform rules that governed their particular sports. Major league baseball pitcher Jim Abbott was forced both to field his position and to take a turn at bat, even though he was born without a right arm. No rules of baseball were modified to accommodate Abbott's disability. Golfer Ben Hogan was not permitted to use a golf cart in championship-level competitions, even though the debilitating injuries that Hogan sustained in a near-fatal automobile accident resulted in a "permanent loss of stamina" that forced Hogan to reduce his annual tournament appearances from thirty to approximately five. See SAMPSON, HOGAN 139.

Respectfully submitted.

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PGA TOUR INC.,

Petitioner,

v.

CASEY MARTIN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

No. 00-24

PGA TOUR INC.,

Petitioner,

v.

CASEY MARTIN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae*.[1] Letters of consent from both parties have been filed with the Clerk of this Court. The brief urges reversal of the decision below and thus supports the position of Petitioner PGA Tour, Inc., before this Court.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of

[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

discriminatory employment practices. Its membership now includes more than 340 of the nation's largest private sector companies, collectively providing employment to more than 17 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12111-12117. In addition, all of EEAC's members are subject to Title III of the ADA, 42 U.S.C. §§ 12181-12189, some because they own, lease (or lease to) or operate places of public accommodation, and all because they own and operate commercial facilities.

Therefore, EEAC's members have a substantial interest in the Court's decision in this case. The court below ruled incorrectly that Title III obligated the sponsor of a professional golf tournament to waive a rule of tournament competition for a player whose disability made him unable to play by that rule. Although it may appear narrow, the decision below could have significant ramifications for every business that offers goods or services to the public, for two reasons. First, by extending Title III's reach past the ropes of the golf tournament into the area of the course reserved for players and their support staffs, the decision arguably pushes Title III into the back rooms, kitchens and other non-public areas of every other place of public accommodation. Second, by requiring the PGA Tour to change the rules of its competition, the decision could be read as requiring places of public accommodation to change the nature of the goods and

services they offer, something well beyond the scope of Title III. In both of these ways, the Ninth Circuit inadvertently may have extended rights under Title III to those who are permitted into restricted, non-public areas of public accommodations as providers, rather than recipients, of the goods and services.

EEAC thus has an interest in, and a familiarity with, the legal and public policy issues presented to the Court in this case. Because of its significant experience in these matters, EEAC is uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

PGA Tour, Inc. ("PGA"), a non-profit association of professional golfers, sponsors three professional golf tours, of which the "PGA Tour" is the most competitive. Pet. App. 2a. Professional golfers qualify for the PGA Tour by playing in a three-stage competition called the "qualifying school." Pet. App. 2a-3a. In the third stage of the qualifying school, and in the PGA Tour competition itself, the rules require players to walk the course during play, although they may use golf carts in the first two stages. Pet. App. 3a. The purpose of the "walking rule," as it is called, is to add a factor of stress and fatigue to the competition. Pet. 4.

Respondent Casey Martin has a physical disability that makes it extremely difficult for him to walk. Pet. App. 2a. Upon completing the first two stages of qualifying school for the PGA Tour in 1997, Martin sought a waiver of the "walking rule" for the third stage. Pet. App. 3a. When the PGA Tour refused, Martin sued under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213. While summarily rejecting Martin's claim of employment discrimination under Title I, Pet. App. 25a, the district court granted a preliminary injunction, and then a permanent

injunction in favor of Martin and against PGA under Title III. Pet. App. 3a. The district court concluded that Title III obligated PGA to waive the "walking rule" for Martin. The Ninth Circuit affirmed. Pet. App. 1a. The next day, the U.S. Court of Appeals for the Seventh Circuit reached precisely the opposite conclusion on nearly identical facts. *Olinger v. United States Golf Ass'n*, 205 F.3d 1001 (7th Cir. 2000). This Court granted PGA's petition for a writ of *certiorari*.

SUMMARY OF ARGUMENT

Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12181-12189, deliberately addresses access to private businesses in two separate ways. One set of requirements, found in § 302 of the ADA, requires places of public accommodation to provide customers and clients with disabilities an equal opportunity to enjoy whatever goods and services the business offers to the public. Only § 303, which requires that new construction or substantial modifications to commercial facilities be built according to established accessibility requirements, addresses the private areas of these facilities not open to the public. Reading the two provisions as overlapping, so as to apply the § 302 requirements to non-public areas of a place of public accommodation, such as a hotel kitchen or the area inside the ropes of a professional golf tournament, inappropriately expands the scope of the statute substantially.

Moreover, Title III of the ADA does not require a place of public accommodation to make a fundamental alteration to the goods or services it offers to the public, such as changing the content of those goods and services in any way. A change to the rules of a professional golf tournament is such a fundamental alteration.

ARGUMENT

I. THE ADA'S "PUBLIC ACCOMMODATIONS" PROVISION ADDRESSES ACCESS ONLY TO THE AREAS IN WHICH GOODS AND SERVICES ARE OFFERED BY A PLACE OF PUBLIC ACCOMMODATION, AND NOT TO NON-PUBLIC AREAS OF THE FACILITY

A. Title III Establishes Separate and Different Requirements for Access to Goods and Services Offered by a Place of Public Accommodation and Access to a Commercial Facility

Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12181-12189, takes a two-stage approach towards legislating access by individuals with disabilities to privately owned businesses. One set of requirements, § 302 of the law, prohibits certain acts — or failures to act — that the law construes as discrimination against individuals with disabilities "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). The other set of requirements, § 303, applies not only to "public accommodations" but also to a broader category of "commercial facilities," defined generally as those "intended for nonresidential use." 42 U.S.C. § 12181(2). This second set of requirements is strictly forward-looking, mandating that accessibility be part of the design and construction when a new commercial facility is built or when an existing commercial facility undergoes significant alterations. 42 U.S.C. § 12183.

Because they impose two very different sets of obligations on two very different universes, the distinction between § 302 and § 303 is an important one. Section 302's

nondiscrimination provisions apply only to the comparatively narrow realm of access to the goods, services, and the like offered by a "place of public accommodation," [2] and only § 303's design and construction requirements apply to the broader category of "commercial facilities."

B. The "Public Accommodations" Provision Focuses Solely on Access to the Goods and Services that the Business Offers to the Public

1. *The statutory language relates only to the goods and services being offered to the public*

Title III defines "public accommodation" by enumerating a finite list of twelve categories of businesses that offer goods and services to the public. 42 U.S.C. § 12181(7). Each of the twelve categories is described by itemizing a few examples,

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[2] In our view, there is a serious issue as to whether either PGA or the PGA Tour is even a "place of public accommodation" and thus a proper defendant under Title III. While the definition of "public accommodation" includes a "golf course, or other place of exercise or recreation," 42 U.S.C. § 12181(7)(L), neither PGA nor the PGA Tour is a "golf course," or any other kind of "place." Nor does the PGA or the PGA Tour own, lease or operate a golf course *as a public golf course*. Several circuit courts of appeals have ruled that the phrase "place of public accommodation" denotes an actual physical location, and therefore have concluded that the type of discrimination prohibited by Title III involves access to a good or service connected to or provided by an actual place, absent which Title III does not apply. *E.g., Stoutenborough v. National Football League*, 59 F.3d 580, 583 (6th Cir. 1995) (holding that a television broadcast is not a service of the facility, or arena, where a football game is played); *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998) (holding no Title III coverage in challenge to insurance benefits where no connection to a place of public accommodation), *cert. denied*, 525 U.S. 1093 (1999). *But see Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n*, 37 F.3d 12 (1st Cir. 1994) (suggesting in *dicta* that Title III should require more than just physical access to a place of public accommodation, but declining to speculate on the full extent of what such coverage might entail).

followed by a more general statement that illustrates the scope of the category, *e.g.*, "a restaurant, bar, or other establishment serving food or drink," 42 U.S.C. § 12181(7)(B), and "a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment, 42 U.S.C. § 12181(7)(E).

Section 302's general nondiscrimination provision is followed by rules of construction consisting of "general" and "specific" prohibitions. 42 U.S.C. § 12182. In general, § 302 states that it is unlawful discrimination to deny an individual with a disability the opportunity to participate in or benefit from whatever the entity provides, or to provide only a separate or unequal benefit. It further generally prohibits using "standards or criteria or methods of administration" that discriminate. 42 U.S.C. § 12182(b)(1)(D). More specifically, § 302 prohibits using eligibility criteria that screen out people with disabilities, and also requires the public accommodation "to make reasonable modifications [that] are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations" being offered, 42 U.S.C. § 12182(b)(2)(A)(ii), and "to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently . . ." as long as doing so would not "fundamentally alter the nature of" the goods, etc. being offered. 42 U.S.C. § 12182(b)(2)(A)(iii). Finally, § 302 provides in relevant part that public accommodations must remove architectural barriers and structural communications barriers where doing so is "readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv).

One common thread among all of § 302's rules of construction is that they purposefully define a covered entity's obligations in terms of the "goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation . . . ." In other words, the thrust of § 302 is to ensure that whatever a place of public

accommodations offers to the public, it is accessible to a member of the public with a disability, if access can be provided without imposing too much of a burden on the business.

In some cases providing access will mean, at a minimum, physical access to a facility. For example, access to the services provided by a movie theater necessarily means, at the very least, physical access to the theater. Notably, a public accommodation need not always provide physical access to its facility in order to meet § 302's requirements. For example, where removing architectural barriers, *e.g.*, steps, is not readily achievable, a store or restaurant may provide curb service or home delivery as an alternative, if *that* is readily achievable. 28 C.F.R. § 36.305.

In other situations, providing access to the goods or services offered by the public accommodation will mean providing "auxiliary aids and services" where doing so would not fundamentally alter the nature of the goods or services offered and would not impose an undue burden. 42 U.S.C. § 12182(b)(2)(A)(iii). This may require providing a sign language interpreter for a lecture series, or Braille menus—or someone to read the menu aloud—in a fast food restaurant. *Cf.* 28 C.F.R. § 36.303.

In any of these circumstances, however, the focus remains on the good or service that the place of public accommodation is offering. Section 302 does not mandate general accessibility to all of the premises that house a public accommodation, such as the "employees only" or "service" areas of a business that caters to the public. Thus, for example, Section 302 does not extend its requirements to a hotel or restaurant kitchen, or the area behind the counter in a dry cleaning establishment. While Section 302 requires a retail store to provide customers with disabilities with access to the goods it sells, it does not address the stockroom or the loading dock. *See Stevens v. Premier Cruises, Inc.*, 215 F.3d

1237, 1241 n.5 (11th Cir. 2000) (while holding that portions of cruise ships are public accommodations subject to Title III of the ADA, court noted that other portions, "such as the bridge, the crew's quarters, and the engine room, might not constitute public accommodations" and, if not, "are not subject to Title III's public accommodations provisions").

2. *Other language in Section 302, together with the legislative history, supports this construction*

The additional language and legislative history of Section 302 confirm its focus on the goods and services offered to the public. Section 302(b)(1)(A)(iv), part of the "general" construction rule, provides that for purposes of all of the "general" construction rules as to activities, "the term 'individual or class of individuals' refers to the *clients or customers* of the covered public accommodation that enters into the contractual, licensing or other arrangement." 42 U.S.C. § 12182(b)(1)(A)(iv) (emphasis added). According to the legislative history of this provision, it was added to clarify Section 302's coverage of public accommodations that enter into contractual arrangements. In particular, the legislative history confirms that this subsection extends Section 302 to cover the public accommodation's own "clients or customers," and not those of the entity with which it contracts. H.R. Rep. No. 101-485, pt. 2, at 101 (1990) (hereinafter "House Labor Report"). "Thus, a public accommodation is not liable under this provision for discrimination that may be practiced by those with whom it has a contractual relationship, when that discrimination is not directed against its own clients or customers." *Id.* The Senate Labor Committee's report addresses this point even more directly, pointing out that "[a]pproximately forty-three million persons with disabilities will be entitled to the protection of this legislation as employees, job applicants, *clients and customers of places of public accommodation*, and

users of telephone services." S. Rep. No. 101-116, at 88 (1989) (hereinafter "Senate Labor Report"). The clear implication of all of these statements is that Title III covers the "clients and customers" of places of public accommodations, who are entitled to access to whatever goods or services are being offered to the public, and not to those individuals who may interact with the public accommodations in other ways.

C. Section 303, Not 302, Addresses Access to an Entire Commercial Facility

Broader access to the entire facility of a place of public accommodation is addressed, not in § 302, but in § 303, which relates to commercial facilities *including* public accommodations. Section 303 requires nothing at all until a new facility is built, or substantial modifications are made to an existing building, at which time the new construction or alteration must be built so that it is "readily accessible to and usable by individuals with disabilities . . . ," 42 U.S.C. § 12183(a)(1). Pursuant to Congressional mandate under § 306(b) and (c) of the ADA, the U.S. Department of Justice has published standards for new construction and alterations at 28 C.F.R. § 36.406, incorporating the Americans with Disabilities Act Accessibility Guidelines ("ADAAG") developed and published by the Architectural and Transportation Barriers Compliance Board at 28 C.F.R. pt. 36, Appendix A.

The ADAAG essentially is a "building code" that applies to all commercial facilities, not just those that house places of public accommodation. It sets specific accessibility requirements such as the width of doorways, 28 C.F.R. pt. 36, App. A, § 4.13.5, and the size, strength and placement of handrails, 28 C.F.R. pt. 36, App. A, § 4.26. Again, the legislative history of § 303 confirms that it is *this* section that was intended to apply to virtually the entire facility. As the Senate Labor Report explains, the term "readily accessible to or usable by"

> is intended to enable people with disabilities (including mobility, sensory, and cognitive impairments) to get to, enter, and use a facility. While the term does not necessarily require the accessibility of every part of every area of a facility, the term contemplates a high degree of convenient accessibility. . .
>
> For example, for a hotel "readily accessible to and usable by includes, but is not limited to, providing full access to the public use and common use portions of the hotel . . . .
>
> In a physician's office, "readily accessible to and usable by" would include ready access to the waiting areas, a bathroom, and a percentage of the examining rooms.

Senate Labor Report at 69-70. *See also* House Labor Report at 118. As the House Labor Committee explained, "both areas that will be used by patrons and areas that will be used by employees, are covered under these standards." House Labor Report at 116. The House Judiciary Committee agreed. H.R. Rep. No. 101-485, pt. 3, at 62-63 (1990) (hereinafter "House Judiciary Report").

The purpose underlying Congress' two-stage approach to accessibility was one of allocation of resources. Rather than requiring instant accessibility everywhere, Congress sought to spread out expenditures so that accessibility eventually would be attained through the passage of time. As the House Judiciary Committee said:

> The ADA is geared to the future—the goal being that, over time, access will be the rule rather than the exception. Thus, the bill only requires modest expenditures to provide access in existing facilities, while requiring all new construction to be accessible. The provision governing alterations is akin to new construction because it is only applicable to situations where the commercial facility itself has chosen to alter the premises.

House Judiciary Report at 63.

Even with respect to commercial facilities, § 303's coverage of non-public, "employees only" areas is limited. To the extent that accessibility is needed for particular workstations, those are left entirely to Title I of the ADA, which governs employment:

> As noted above, the standard of "readily accessible to and usable by" applies not only to areas that will be used by patrons, but also to areas that may be used by disabled employees. . . The same basic approach applies in employment areas for both public accommodations and commercial facilities. Thus, access into and out of the rooms is required. In addition, there must be an accessible path of travel in and around the employment area. The basic objective is that a person with a disability must be able to get to the employment area. . . .
>
> The standard does not require, however, that individual workstations be constructed accessible or be outfitted with fixtures that make it accessible to a person with a disability. Such modifications will come into play in the form of reasonable accommodations when a person with a disability applies for a specific job and is governed by the undue hardship standard. . . .

House Labor Report at 119. *See also* House Judiciary Report at 62-63. Accordingly, the ADAAG contains a corresponding exemption for "work areas." 28 C.F.R. pt. 36, App. A, § 4.1.1(3).

D. Misreading the ADA's "Public Accommodations" Requirements To Encompass Private Areas Erroneously Expands the Scope of the Statute

Extending the requirements of § 302 beyond the public access areas of a place of public accommodation blurs the otherwise clear distinction between the requirements of § 302 and those of § 303, and substantially expands the scope of the

statute. The Department of Justice itself, which has enforcement authority over Title III, has recognized the possibility that a commercial facility may be part public accommodation, part not:

> If a tour of a commercial facility that is not otherwise a place of public accommodation, such as, for example, a factory or a movie studio production set, is open to the general public, the route followed by the tour is a place of public accommodation and the tour must be operated in accordance with the rule's requirements for public accommodations. The place of public accommodation defined by the tour does not include those portions of the commercial facility that are merely viewed from the tour route. Hence, the barrier removal requirements of § 36.304 only apply to the physical route followed by the tour participants and not to work stations or other areas that are merely adjacent to, or within view of, the tour route. If the tour is not open to the general public, but rather is conducted, for example, for selected business colleagues, partners, customers, or consultants, the tour route is not a place of public accommodation and the tour is not subject to the requirements for public accommodations.

28 C.F.R. pt. 36, App. B, § 36.104. In the same discussion, the agency also describes, under the general term "mixed-use," such varied operations as a wholesale grocer (a commercial facility) that runs a roadside stand selling produce to the public (a public accommodation); a hotel that has a residential wing (not subject to Title III); and a public wing (a place of lodging covered by Title III as a place of public accommodation). In each of these situations, the government explains that the "public accommodations" provisions of the ADA apply only to that segment of the facility that is indeed a public accommodation.

Moreover, a misreading of § 302 that extends its requirements to the entire operation of a business that

services the public, rather than merely the "accommodations" it offers the public and the physical space used for that purpose, creates significant anomalies that cannot be reconciled. For example, this overly-broad reading of § 302 would extend its obligations into the kitchen area of a typical hotel. There, an independent contractor who runs his own dishwasher repair service, and who uses a wheelchair, arguably could claim that the hotel discriminated against him by not providing access inside the dishwasher area, even though § 303 would not require such access even in a new building. At a retail store, a business invitee who delivers shipments of goods for sale to the loading dock, and who has a hearing impairment, could argue that the store discriminated by not providing a sign language interpreter for him to communicate with store employees receiving the shipment.

Such a reading of § 302 would substantially broaden the statute's reach. Title I of the ADA details the actions an employer is required to take to accommodate the needs of its employees and applicants with disabilities. The public accommodations provisions of Title III address access by clients and customers to whatever goods and services a public accommodation offers to the public, while the commercial facilities provisions establish prospective requirements for accessibility to the entire facility whenever a new building is built or a significant modification is made. Extending the "public accommodations" requirements to areas of the physical plant that the public is not permitted to enter arguably would extend those requirements to non-employee, non-customer, non-client relationships. Doing so would remarkably expand the obligations of every place of public accommodation in America, to ensure not only that the public has access to the goods and services it provides, but also that everyone else whom it permits to enter those parts of its premises that are off-limits to the public, has the same rights as its clients and customers to whom it offers its goods and

services. If this degree of breadth were contemplated by Congress, surely it would be reflected in the Act.[3]

II. TITLE III OF THE ADA DOES NOT REQUIRE A PLACE OF PUBLIC ACCOMMODATION TO MAKE A FUNDAMENTAL ALTERATION TO THE GOODS AND SERVICES IT OFFERS BY CHANGING THEIR CONTENT

A. The Statutory Language Provides Explicitly That a Fundamental Alteration Is Not Required

While Title III requires a public accommodation to make "reasonable modifications" and "take such steps as may be necessary," to allow an individual with a disability equal treatment, it does not require a public accommodation to "fundamentally alter" the product it offers the public. 42 U.S.C. § 12182(b)(2)(A)(ii) and (iii). Rather, Section 302 provides specifically to the contrary. *Id.* The phrase is drawn from this Court's opinion in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), holding that the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*, did not require an educational institution to make a "fundamental alteration in the nature of [its nursing school] program" in order to allow an individual with a severe hearing disability to participate. *Id.* at 410.

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[3] For this reason, the Third Circuit's decision in *Menkowitz v. Pottstown Mem'l Med Ctr.*, 154 F.3d 113 (3d Cir. 1998), is in error. The Third Circuit ruled that a hospital that suspended a physician's staff privileges could be sued under Title III, as having denied him the "'full and equal enjoyment of the good, services, facilities, privileges, advantages, or accommodations'" it provided. *Id.* at 122. In its zeal to find a cause of action, the Third Circuit overlooked the obvious: that the "service" a hospital provides is medical care to the public, and that the staff privileges of a particular non-employee doctor are merely antecedent to that service.

B. Title III Does Not Require Changes to the Content of Goods and Services Offered by a Place of Public Accommodation

Section 302 requires a public accommodation to give individuals with disabilities the same access to whatever goods or services it offers; it does not require the business to offer *different* goods or services that better meet the needs of people with disabilities. Accordingly, *any* change to the content of the goods or services offered to the public would constitute a fundamental alteration not required by Title III.

As the Department of Justice explained in the preamble to the regulations implementing Title III, "[t]his part does not require a public accommodation to alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities." 28 C.F.R. § 36.307(a). As the agency said:

> The purpose of the ADA's public accommodations requirements is to ensure accessibility to the goods offered by a public accommodation, not to alter the nature or mix of goods that the public accommodation has typically provided. In other words, a bookstore, for example, must make its facilities and sales operations accessible to individuals with disabilities, but is not required to stock Brailled or large print books. Similarly, a video store must make its facilities and rental operations accessible, but is not required to stock closed-captioned video tapes.

28 C.F.R. pt. 36, App. B, § 36.307. The same principle is reflected in the legislative history. *See* Senate Labor Report at 63-64, House Labor Report at 107. The Senate Labor Committee further illustrated the point that Title III does not require a place of public accommodation to alter the "services" it offers:

> [A] physician who specializes in treating burn victims could not refuse to treat the burns of a deaf person because of his or her deafness. However, such a physician need not treat the deaf individual if he or she does not have burns nor need the physician provide other types of medical treatment to individuals with disabilities unless he or she provides other types of medical treatment to nondisabled individuals.

Senate Labor Report at 62-63.

Several of the courts of appeals have had occasion to address directly the issue of whether Title III extends to the *content* of goods and services provided, in the context of insurance policies. Each of these, including the Ninth Circuit, have concluded that it does not.[4] As the Third Circuit correctly reasoned, "Just as a bookstore must be accessible to the disabled but need not treat the disabled equally in terms of books the store stocks, likewise an insurance office must be physically accessible to the disabled but need not provide insurance that treats the disabled equally with the non-disabled. *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 613 (3d Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999). *See also Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1115 (9th Cir. 2000) ("The ordinary meaning of [Title III's] language is that whatever goods or services the place provides, it cannot discriminate on the basis of disability in providing enjoyment of those goods and services. This language does not require provision of different goods or services, just nondiscriminatory enjoyment of those that are provided"); *McNeil v. Time Ins. Co.*, 205 F.3d 179, 186 (5th Cir. 2000) (holding that under the plain language of the statute, Title III forbids denying the disabled full and equal

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[4] The First Circuit's decision in *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994), often cited for the opposite position, does not actually reach the issue, describing the question as "ambiguous," 37 F.3d at 19, and declining to address it, 37 F.3d at 20.

enjoyment of whatever goods and services are offered, but does not regulate the content of those goods and services); *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 563 (7th Cir. 1999) ("section 302(a) does not require a seller to alter his product to make it equally valuable to the disabled and to the nondisabled, even if the product is insurance"), *cert. denied*, 120 S. Ct. 845 (2000); *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1012 (6th Cir. 1997) (en banc) ("Title III regulates the availability of the goods and services the place of public accommodation offers as opposed to the contents of goods and services offered by the public accommodation") (footnote omitted), *cert. denied*, 522 U.S. 1084 (1998).[5] *Cf. EEOC v. Staten Island Sav. Bank*, 207 F.3d 144 (2d Cir. 2000) (reaching same conclusion under Title I with respect to employer-provided insurance);[6] *Kimber v. Thiokol Corp.*, 196 F.3d 1092 (10th Cir. 1999) (same); *Lewis v. Kmart Corp.*, 180 F.3d 166, 168 (4th Cir. 1999) (holding that under Title I, providing employee with access to the benefit offered by the employer is sufficient (relying on *Rogers v. DHEC*, 174 F.3d 431 (4th Cir. 1999) (deciding same issue under Title II)), *cert. denied*, 120 S. Ct. 978 (2000)).

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[5] As several of these courts have pointed out, the Department of Justice inexplicably has taken a contrarian position, solely with respect to insurance products. Dep't of Justice, *Title III Technical Assistance Manual: Covering Public Accommodations and Commercial Facilities*, § III-3.11000, at 19 (Nov. 1993). These courts correctly have rejected the Justice Department's statement, observing that it is "'manifestly contrary' to the plain meaning of Title III and, accordingly, is not binding on this court." *Ford*, 145 F.3d at 613 (citation omitted); *Parker*, 121 F.3d at 1012 n.5. *See also Doe*, 179 F.3d at 563 (describing the guidance as lacking "a focused attention to coverage limits").

[6] The Second Circuit's decision in *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28 (2d Cir. 1999), is not to the contrary. *Pallozzi* concluded that Title III requires not only physical access, but also prohibits a public accommodation from refusing to do business with an individual with a disability because of the disability. 198 F.3d at 33.

This resolution is consonant with the clear statutory language providing that a place of public accommodation need not "fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations . . . ." 42 U.S.C. § 12182(b)(2)(A)(ii). *See also* 42 U.S.C. § 12182(b)(2)(A)(iii). While a place of public accommodation may be able to make "reasonable modifications in policies, practices and procedures . . . to afford such goods, services [etc.] to individuals with disabilities," 42 U.S.C. § 12182(b)(2)(A)(ii), or "to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services," 42 U.S.C. § 12182(b)(2)(A)(iii), both provisions halt the obligation short of fundamentally altering whatever it is that the public accommodation offers.

This language also is consistent with this Court's decisions interpreting the Rehabilitation Act of 1973, the predecessor to the ADA. In *Alexander v. Choate*, 469 U.S. 287 (1985), this Court ruled that the State of Tennessee's decision to reduce from 20 to 14 the number of inpatient days for which Medicaid would reimburse hospitals on behalf of a single recipient in a fiscal year did not violate Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. Although the reduction arguably would have affected individuals with handicaps more severely than those without handicaps, the Court reasoned that the Rehabilitation Act "does not . . . guarantee the handicapped equal results from the provision of state Medicaid . . . ." *Id.* at 304. Rather, the Court concluded, "an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers." *Id.* at 301.

As the Fifth Circuit has explained, "it is literally possible, though strained, to construe 'full and equal enjoyment' to

suggest that the disabled must be able to enjoy every good and service offered to the same and identical extent as those who are not disabled. Construed in this manner, the statute would regulate the content and type of goods and services. That would be necessary to ensure that the disabled's enjoyment of goods and services offered by the place of public accommodation would be no less than, or different from that of the non-disabled. But such a reading is plainly unrealistic, and surely unintended, because it makes an unattainable demand." *McNeil*, 205 F.3d at 187.

C. Changing the Rules of a Professional Golf Tournament Would Be a Fundamental Alteration That Exceeds the ADA's Requirements

In the instant case, Martin makes such an unattainable demand. Even assuming that Title III applies to the competitors on the PGA Tour rather than just the spectators, the modification Martin is requesting is a fundamental change to what the PGA Tour offers — a professional, competitive athletic event. The Seventh Circuit correctly resolved this question in a case involving nearly identical facts, holding that waiver of the "walking rule" to allow a competitor with a disability to ride in a golf cart would "fundamentally alter the nature of the competition." *Olinger v. United States Golf Ass'n*, 205 F.3d 1001, 1005 (7th Cir. 2000). While it is regrettable that Martin cannot meet the "walking rule," his situation is no different from that of an individual with a visual disability who cannot fully and equally enjoy the goods offered in an ordinary bookstore. While the store certainly could not deny that person access, or refuse to sell him books because of his visual disability, it would not be required to stock Braille books to accommodate him, since doing so would be a fundamental alteration to the goods it offers the public. In the same way, if Martin could qualify for the PGA Tour, the PGA could not deny him access to the Tour, nor could it refuse to let him play the same game as other

competitors. The PGA is not, however, required to fundamentally alter the nature of the competition.

CONCLUSION

For the reasons set forth above, *amicus curiae* Equal Employment Advisory Council respectfully submits that the decision below should be reversed.

Respectfully submitted,

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November 2000

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DEC 13 2000 No. 00-24

In The

Supreme Court of the United States

PGA TOUR, INC.

Petitioner,

v.

CASEY MARTIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, BAZELON CENTER FOR MENTAL HEALTH LAW, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, AND 29 OTHER NATIONAL DISABILITY ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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American Network of Community Options and Resources
American Therapeutic Recreation Association
The Arc of the United States
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Brain Injury Association
Brain Injury Family Assistance Center
Center on Disability and Health
Disability Rights Education and Defense Fund
Epilepsy Foundation®
HalfthePlanet Foundation
Justice For All
Learning Disabilities Association of America
National Alliance for the Mentally Ill
National Association for the Advancement of Orthotics and Prosthetics
National Association of Developmental Disabilities Councils
National Association of Protection and Advocacy Systems
National Center on Accessibility
National Council on Independent Living
National Federation of the Blind
National Health Law Program
National Mental Health Association
National Multiple Sclerosis Society
National Therapeutic Recreation Society
Paralyzed Veterans of America
Polio Society
Self Help for Hard of Hearing People

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QUESTIONS PRESENTED

1. Whether the rules governing PGA Tour events are subject to the requirements of Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181 *et seq.*, which prohibits disability-based discrimination by operators of public accommodations.

2. Whether the district court properly held that waiver of the PGA Tour's "walking rule" would not "fundamentally alter" its competition.

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INTEREST OF THE *AMICI CURIAE*[1]

This case involves the scope and interpretation of Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181 *et seq.*, which protects people with disabilities against discrimination by public accommodations. *Amici* are national organizations that advocate on behalf of people with disabilities. Because many of the members of these organizations have encountered discrimination in a variety of public accommodations settings, *amici* are concerned about the implications that this Court's decision will have for the range of cases brought under ADA Title III. (A description of each of the *amici* appears in Appendix A.)

STATEMENT

Casey Martin is a professional golfer. Pet. App. 16a. Martin has a condition known as Klippel-Trenaunay-Weber Syndrome, which has caused significant atrophy and weakening of his right leg. Pet. App. 2a, 16a. His condition causes him severe pain at all times, and "the simple act of walking" places him at significant risk of breaking his leg, bleeding, and developing blood clots. Pet. App. 16a-17a. Martin's condition has become more severe over time, to the extent that he is now physically unable to walk the course during a round of golf. Pet. App. 18a, 32a.

After playing on the varsity team at Stanford University, Martin sought to play professionally on the PGA Tour. A principal way in which golfers join the PGA Tour is through participation in the PGA's so-called "qualifying school tournament." Pet. App. 42a. That tournament is open to "[a]ny member of the public who pays a $3000

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[1] No counsel for any party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of the brief. The parties' written consents to the filing of this brief are being lodged with the Clerk of the Court.

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entry fee and supplies two letters of recommendation." Pet. App. 7a; *id.* at 42a. It consists of three stages. In the first stage, golfers play 72 holes. Pet. App. 42a. Those who score well enough advance to the second stage, which also consists of a 72-hole competition. *Ibid.* About 170 players with the top scores in the second stage advance to the third stage, which consists of 108 holes. *Ibid.* The 35 players with the best scores in the third stage of the qualifying school tournament receive playing privileges on the PGA Tour. *Ibid.* The seventy remaining players with the best scores receive playing privileges on the Buy.com Tour – another professional golf tour operated by the PGA. *Ibid.* (At the time of the district court's opinion, the Buy.com Tour was known as the Nike Tour. See Pet. Br. 5.) Players on the Buy.com Tour may advance to the PGA Tour if they win three tournaments in a season or finish in one of the top 15 places on the Buy.com Tour money list. Pet. App. 42a. Tour golfers compete in tournaments for monetary prizes, but they are not guaranteed any payout. Tr. 815-817.

In the first two stages of the qualifying school tournament, the Tour permits players to use golf carts to carry them between shots. Pet. App. 42a. In the final round of that tournament, and in the tournaments that make up the PGA Tour and the Buy.com Tour, the PGA imposes a "walking rule": Contestants must walk between shots, and they must use caddies to carry their clubs. *Ibid.* This walking rule is not required by the official "Rules of Golf" promulgated jointly by the United States Golf Association and the Royal and Ancient Golf Club of St. Andrews, Scotland, but it forms a part of the supplemental "conditions of competition" imposed on PGA Tour and Buy.com Tour golfers. Pet. App. 30a.

In September of 1997, Martin paid the $3000 application fee, submitted the requisite letters of recommendation, and entered the qualifying school tournament. Pet. App. 42a. He performed well enough in the first and second stages of the tournament to advance to the final stage. *Ibid.* Because Martin's disability prevented him

from walking the course, he requested that the PGA waive the walking rule in the third stage of the qualifying school tournament. Pet. App. 3a. The NCAA and the Pac-10 athletic conference had provided Martin the same accommodation when he played intercollegiately. Pet. App. 11a n.8. But the PGA denied the request. Pet. App. 3a, 18a.

Martin then filed this lawsuit. He claimed, *inter alia*, that the PGA had violated Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181 *et seq.*, by refusing to waive its walking rule to permit him to play. J.A. 94-95. The district court granted a preliminary injunction that directed the PGA to allow Martin to use a cart during the third stage of the tournament. Pet. App. 43a. The Tour complied by waiving the walking rule for all players who had reached the third stage. *Ibid.* Martin participated in the third stage, finished among the top 105 scorers, and accordingly qualified to play in what was then the Nike Tour. *Ibid.* By stipulation of the parties, the district court then extended the preliminary injunction to cover the tournaments in which Martin participated in the Nike Tour. *Ibid.*

The district court held a trial on the merits in February 1998 (J.A. 21-22), and issued its findings of fact and conclusions of law shortly thereafter. Pet. App. 16a-40a. The court first concluded that the rules governing those events were subject to Title III's "reasonable modification" requirement. Pet. App. 19a. It then went on to reject the PGA's defense that waiver of the walking rule would "fundamentally alter" its competitions. Pet. App. 19a-40a.

Accordingly, the district court entered a permanent injunction that required the PGA "to provide Plaintiff with automotive transportation in NIKE TOUR and PGA TOUR competitions in which plaintiff is eligible to participate." J.A. 90. The Ninth Circuit affirmed. Pet. App. 1a-15a.

SUMMARY OF ARGUMENT

I. Title III of the ADA protects any "individual" against disability-based discrimination "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations" of a public accommodation. 42 U.S.C. § 12182(a). By paying a $3,000 entry fee and submitting two letters of recommendation, Casey Martin sought to enjoy a variety of "goods, services, facilities, privileges, advantages, [and] accommodations" offered by the PGA Tour: reserving a location, gathering together other top competitors, setting ground rules to govern the competition, assembling an audience, and providing prize money to those who succeed in the competition. By its plain text, Title III forbade the Tour to discriminate on the basis of disability in these services.

The PGA concedes that Title III protects *spectators* at places of entertainment like the courses on which its tournaments are held, but it argues that Title III cannot protect *participants* in those tournaments. But case law under Title II of the Civil Rights Act of 1964 – the model for Title III of the ADA – decisively rejects that argument. See *Daniel* v. *Paul*, 395 U.S. 298, 306 (1969); *United States* v. *Slidell Youth Football Ass'n*, 387 F. Supp. 474 (E.D. La. 1974). The PGA plainly provides two different services to the public: To those who pay admission, it offers the opportunity to watch its tournaments; and to those who pay a $3,000 entry fee and submit two letters of recommendation, it offers the opportunity to participate in its tournaments. Title III prohibits disability-based discrimination against individuals in either of these groups. A contrary reading of the statute would have implications that go well beyond professional athletics and withdraw protection in a significant number of settings that Congress plainly intended to cover.

The PGA contends that a narrower reading is dictated by Congress's use of the words "client or customer" in a single sub-section of a Title III provision that is not at issue here. See 42 U.S.C. § 12182(b)(1)(A)(iv). But that language does not limit Title III's broad general rule. Nor is the PGA correct that application of Title III to Casey Martin effects an evasion of the limitations Congress imposed on the ADA's employment discrimination title, Title I, 42 U.S.C. § 12111 *et seq.* Title I provides the exclusive Americans with Disabilities Act cause of action for a dispute between a public accommodation and one of its "employees." But Martin is not an "employee" of the Tour, so Title I simply does not apply. The applicability of Title III to his case cannot turn on the textually unmoored inquiry into whether his is *really* a case of "workplace discrimination." *Cf.* Pet. Br. 26. Rather, it must turn on the inquiry required by Title III's text: whether Martin has been denied "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). Martin plainly satisfied that test.

II. The district court properly held that waiver of the walking rule would not "fundamentally alter" PGA Tour golf. Contrary to the PGA's assertions, nothing in the district court's order requires a *selective* waiver of the walking rule. The district court ordered the Tour to permit Casey Martin to use a cart, but it did not bar the Tour from waiving its walking rule for all other golfers. Indeed, the Tour responded to the preliminary injunction by permitting *all* competitors in the third stage of the qualifying school tournament to use carts. If the district court's permanent injunction has led to disuniformity in the rules applied to PGA Tour competitors, that disuniformity is entirely of the Tour's making.

The PGA thus cannot defend the walking rule by invoking the interest in uniform rules. It must demonstrate that the walking rule is itself fundamental to the competition. 42 U.S.C. § 12182(b)(2)(A)(ii). Based on the unchallenged findings of the district court, it is evident that the Tour has failed to carry that burden.

Because they are tests of an arbitrarily defined set of skills, top-level professional sports are distinctive in ways

that relate to the fundamental alteration inquiry. In particular, courts lack any clear basis to second-guess a league's choices of *which* skills the competition should test or of *how much* those skills should matter to the outcome. In this respect, top-level professional sports are quite unlike many of the far more typical fact scenarios in which the ADA is applied. But the rules of such sports are not immune from the statutorily mandated fundamental alteration analysis. Courts must still assess whether a rule that excludes people with disabilities *in fact* tests the skills that the league purports to be testing. In many cases, of course, that determination can be expected to support the league's judgment. But the league nonetheless retains a statutory obligation to prove – by evidence and not speculation – a connection between the challenged rule and the skills it purports to test.

The district court found that "the fatigue factor injected into the game of golf by walking the course cannot be deemed significant under normal circumstances." Pet. App. 33a. That finding was supported by a significant amount of evidence presented at trial, the court of appeals did not disturb it, and the PGA does not contend that it was clearly erroneous. Instead, the PGA reads the district court's finding as necessarily implying that the walking rule *does* affect the outcome of golf competitions under some circumstances. Fairly read, the district court's finding contains no such implication, and this Court does not sit to supply missing factfindings through negative implication. See *Pullman-Standard* v. *Swint*, 456 U.S. 273, 291-292 (1982). In any event, the PGA's brief offers nothing but speculation and assertion to support the notion that walking-induced fatigue affects the outcome of golf competitions. Because the chance that the walking rule has an effect on competitive outcomes is speculative at best, the district court properly held that waiver of that rule would not effect a fundamental alteration.

ARGUMENT

I. Title III of the ADA Prohibits the PGA Tour From Discriminating on the Basis of Disability Against Individuals Who Compete in its Tournaments.

A. Individuals Who Compete in PGA Tournaments Obtain "Goods, Services, Facilities, Privileges, Advantages, or Accommodations" Offered by the PGA Tour.

Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181 *et seq.*, prohibits disability-based discrimination in public accommodations. Title III begins by announcing a "general rule" (42 U.S.C. § 12182(a)):

> (a) General rule
>
> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to) or operates a place of public accommodation.

The PGA does not deny that the golf courses on which its tournaments are held constitute "places of public accommodation." See 42 U.S.C. § 12181(7)(C) ("public accommodation" includes "place of exhibition or entertainment"), 42 U.S.C. § 12181(7)(L)("public accommodation" includes "golf course, or other place of exercise or recreation"). Nor does it deny that, on tournament days, it "operates" the golf courses and therefore must comply with the requirements of Title III. See 42 U.S.C. § 12182(a). The PGA contends, however, that Title III does not protect Casey Martin or any other competitor at its tournaments. According to the PGA, the statute protects only a limited class of people at a place of public entertainment such as a golf course hosting a PGA event: "the spectators and other attendees who are there to watch the tournament." Pet. Br. 22; see also USGA Br. 12. That

argument fundamentally misreads the statutory language.

The PGA Tour plainly provides two separate kinds of "goods, services, facilities, privileges, advantages, or accommodations" to the public. The first is the opportunity to view its tournaments – an opportunity the Tour provides to any member of the public who comes to the golf course and pays an admissions fee. The second is the opportunity to compete for a place in the tournament and ultimately for prize money before the audience assembled by the Tour – an opportunity the Tour provides to "[a]ny member of the public who pays a $3000 entry fee and supplies two letters of recommendation." Pet. App. 7a. By coordinating participation in, reserving a location for, and setting ground rules to govern the competition, the PGA creates the necessary preconditions for both participation in and viewing of a top-level athletic event. Cf. *NCAA* v. *Board of Regents*, 468 U.S. 85, 101-102 (1984) (athletic league's function of coordinating and setting rules for competition serves both fans and competitors). In arranging its tournaments, the PGA thus performs an important service *both* to its spectators *and* to its competitors (none of whom is employed by the PGA itself). By the plain text of the statute, the PGA is forbidden from depriving *either* of these classes of individuals of the full and equal access to these opportunities on the basis of disability.[2]

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[2] If the opportunity to compete for a place on the tour were "not in fact open to the public," 42 U.S.C. § 2000a(e) (setting forth so-called "private club" exemption under Title II of the Civil Rights Act of 1964), then Title III would not cover the PGA's practices governing participation in the competition. See 42 U.S.C. § 12187 (incorporating the exemption in 42 U.S.C. § 2000a(e) by reference). But the district court rejected the PGA's attempt to invoke this narrow exemption, Pet. App. 45a-51a, and the PGA has not challenged that ruling in the Ninth Circuit or here. Nor could the PGA reasonably challenge that ruling.

Cases interpreting Title II of the Civil Rights Act of 1964 – the model for Title III of the ADA[3] – have decisively rejected the contention that, at places of public entertainment, only spectators and not participants are protected against discrimination. In *Daniel* v. *Paul*, 395 U.S. 298, 306 (1969), this Court found "no support" for the argument that " 'place of entertainment' refers only to establishments where patrons are entertained as spectators or listeners rather than those where entertainment takes the form of direct participation in some sport or activity." Relying on *Daniel*, the court in *United States* v. *Slidell Youth Football Ass'n*, 387 F. Supp. 474, 482 (E.D. La.

This Court has made clear that an entity open to all members of the public who meet identified admissions prerequisites is "in fact open to the public" for purposes of 42 U.S.C. § 2000a(e). See *Runyon* v. *McCrary*, 427 U.S. 160, 172 n.10 (1976) (private schools were "in fact open to the public" because they "appeal[ed] to the parents of all children in the area who can meet their academic and admissions requirements") (internal quotation marks omitted). And by extending Title III coverage to "secondary, undergraduate, or post-graduate private school[s]," 42 U.S.C. § 12181(7)(J) – many of which impose far more selective criteria for admissions than the PGA imposes for determining access to its qualifying tournament – Congress plainly contemplated that the statute would cover institutions that applied quite stringent criteria to determine which members of the public would be allowed to participate in their programs.

[3] Like ADA Title III, Title II of the Civil Rights Act guarantees "full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation," 42 U.S.C. § 2000a(a), and extends to "place[s] of exhibition or entertainment," 42 U.S.C. § 2000a(b)(3). If anything, Congress intended the coverage of ADA Title III to be *broader* than that of CRA Title II, for the ADA's definition of "public accommodations" extends beyond the relatively narrow class of entities covered by the CRA. See H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 35 (1990).

1974), held that Title II prohibited a youth football league from denying African-American children the opportunity to participate as players. Because its teams played before an audience of about 600 paying customers each week, see *id.* at 477, the court held that the league operated a place of entertainment, see *id.* at 483. The league did not discriminate against African-American spectators any more than the PGA has discriminated against spectators with disabilities here. See *id.* at 477 (African-Americans had been allowed to attend the league's games as paying spectators). But the court held that the league had nonetheless violated Title II by denying African-Americans the chance to play on its teams. See *id.* at 480-481. The same principle applies here. Regardless of whether the PGA allows all people with disabilities to attend its events as spectators, it is still forbidden from discriminating on the basis of disability in determining which members of the public may participate in its events as competitors.

By disregarding this point, the PGA's argument would artificially deprive people with disabilities of protection in a wide range of cases in which operators of public accommodations offer multiple "goods, services, facilities, privileges, advantages, or accommodations" to the public. An unpaid community orchestra that performs at a place of entertainment offers members of the community the opportunity both to attend its performances and to try out for positions in the orchestra. And many public accommodation operators essentially provide a place for sellers and consumers to meet. For example, a baseball card show that leases a "convention center . . . or other place of public gathering" (42 U.S.C. § 12181(7)(D)) may allow members of the public to rent tables so they can sell cards to other members of the public; flea markets and farmers' markets often have a similar structure. In such cases, both the sellers and the consumers enjoy the "services, facilities, privileges, advantages, or accommodations" of the place of public

accommodation: The consumers enjoy the opportunity to purchase goods from the sellers, and the sellers enjoy access to a pre-assembled market of consumers.

If, fearing the negative reactions of others, a community orchestra were to deny a violinist with a serious skin disease the opportunity to audition and play or a baseball card show were to refuse to rent a table to a potential seller with the same disability, those individuals would be denied "full and equal enjoyment" of the "services, facilities, privileges, advantages, [and] accommodations" of a public accommodation. Title III's plain text would protect those individuals with disabilities, and Congress clearly sought to prohibit discrimination in circumstances just like these. See, *e.g.*, 42 U.S.C. § 12101(a)(3) (congressional finding that "discrimination against individuals with disabilities persists in such critical areas as," *inter alia*, "recreation"); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 35 (1990) (justifying the drafters' decision to include a wide range of facilities under Title III's "public accommodations" definition by referring to the then-Attorney General's statement "that we must bring Americans with disabilities into the mainstream of society – 'in other words, full participation in and access to all aspects of society' "). But the PGA's position would improperly deprive those individuals of protection.

The PGA may be correct that no Member of Congress specifically contemplated that the same principles would apply to members of the public who, like Casey Martin, try out for and seek to play in a top-level professional athletic league. But "the fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.' " *Pennyslvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 212 (1998) (quoting *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 499 (1985)) (internal quotation marks omitted). Because the plain text of Title III reaches any "individual" who seeks the "goods, services, facilities, privileges,

advantages, or accommodations of any place of public accommodation," 42 U.S.C. § 12182(a), and because Casey Martin is such an individual, he may properly invoke the statute's protection.

B. The "Client or Customer" Language Does Not Limit the Broad Coverage Afforded by the Text of Title III's General Rule.

The plain language of Title III's general rule protects any "individual" from discriminatory deprivation of *any* "goods, services, facilities, privileges, advantages, or accommodations" offered by a place of public accommodation. 42 U.S.C. § 12182(a). That language makes clear that statutory coverage is not limited to mere spectators or passive recipients of services; Title III also protects members of the public who actively engage in other types of participatory opportunities offered by the public accommodation. In the face of that broad language – which plainly reaches Casey Martin's situation – the PGA relies on a different provision of Title III to contend that statutory protection is limited to a public accommodation's "clients or customers," 42 U.S.C. § 12182(b)(1)(A)(iv) – a term that the PGA appears to read as encompassing only consumers in a marketplace transaction. Pet. Br. 18-22.

As an initial matter, the PGA's suggestion that Title III protection extends only to consumers who purchase goods and services in the marketplace is difficult to reconcile with Title III's broad coverage. The statute reaches many types of entities that frequently do not offer their "goods, services, facilities, privileges, advantages, or accommodations" in marketplace transactions at all. Examples specifically listed in the statute include: "lecture hall," 42 U.S.C. § 12181(7)(D); "museum, library, gallery, or other place of public display or collection," 42 U.S.C. § 12181(7)(H); "park, zoo," 42 U.S.C. § 12181(7)(I); and "senior citizen center, homeless shelter, food bank," 42 U.S.C. § 12181(7)(K). The statute also reaches other

entities – notably "a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education," 42 U.S.C. § 12181(7)(J) – for which the marketplace characterization is awkward at best. The PGA is thus incorrect to say that "[t]he subject to which Title III is addressed is discrimination in the marketplace." Pet. Br. 10.

Nor does the PGA's reliance on the "client or customer" language advance its argument. The words "client or customer" neither purport to limit nor suggest any particular intent to limit the class of individuals who are protected under Title III's general rule. To the contrary, their plain meaning embraces any individual who seeks any "goods, services, facilities, privileges, advantages, or accommodations" that the defendant offers the public.[4] In other words, they embrace any individual who is covered under the broad plain language of Title III's general rule.

The placement of the "client or customer" language in the statute makes this reading apparent. After establishing Title III's "general rule" in 42 U.S.C. § 12182(a), the statute proceeds, in the balance of § 12182, to set forth a number of more specific prohibitions encompassed by that rule. One of those more specific prohibitions is set forth in three successive subsections, § 12182(b)(1)(A)(i) through (A)(iii). Among other things, these subsections bar covered entities from *indirectly* discriminating (that is, effectuating discrimination through contractual arrangements with third parties) against an "individual or class of individuals" seeking "goods, services, facilities, privileges, advantages, or accommodations." 42 U.S.C.

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[4] See Webster's Third New Int'l Dictionary 559 (1993) (defining "customer" to include "one that patronizes *or uses the services*") (emphasis added); *id.* at 422 (defining "client" to include "a person who engages the professional advice or services of another" and "a person served by or utilizing the services of a social agency or a public institution").

§ 12182(b)(1)(A)(i)-(iii). The "client or customer" language appears in a subsection that emphasizes the limited scope of the additional obligations imposed by this prohibition against indirect discrimination: "For purposes of clauses (i) through (iii) of this subparagraph, the term 'individual or class of individuals' refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing, or other arrangement." 42 U.S.C. § 12182(b)(1)(A)(iv).

This provision makes clear that a public accommodation operator is liable for indirect discrimination only when that discrimination affects individuals who seek the "goods, services, facilities, privileges, advantages, or accommodations" of the public accommodation itself; the operator is not liable for discrimination that affects only those people who seek the "goods, services, facilities, privileges, advantages, or accommodations" of its contracting partner. The key words in this provision therefore are not "client or customer" (which is merely a shorthand reference for "individual seeking the goods, services, facilities, privileges, advantages, or accommodations") but rather "of the covered public accommodation" (which identifies *whose* clients or customers a public accommodation operator must protect against indirect discrimination). The legislative history makes this point crystal clear.[5]

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[5] *See* H.R. Rep. No. 485, Pt. 2, at 101 (1990) ("[T]he 'individual or class of individuals' referenced in section 302(b)(1)(A)(i)-(iii) has always been intended to refer to the clients and customers of the public accommodation that entered into a contractual arrangement. The section has never been intended to encompass the clients or customers of other entities. Thus, a public accommodation is not liable under this provision for discrimination that may be practiced by those with whom it has a contractual relationship, when that discrimination is not directed against its own clients or customers.").

By paying the entry fee and submitting two letters of recommendation, Casey Martin sought to avail himself of the PGA's "services, facilities, privileges, advantages, or accommodations" in coordinating the golf competition, providing an opportunity to compete, and assembling an audience. He therefore became a "client or customer" of the Tour within the meaning of Title III.

C. The Application of ADA Title III to This Case Does Not Conflict With Any Limitations on the Reach of ADA Title I.

The PGA contends that Martin's claim is essentially one for "workplace discrimination." Pet. Br. 26. Because Martin is not a common-law "employee," it is clear that he may not invoke the protections of ADA Title I, which provides a range of remedies (including back pay and, in many circumstances, damages) for disability-based employment discrimination. See 42 U.S.C. § 12111 *et seq.* But the PGA takes the point a step further. Because, it contends, Martin's claim is best characterized as a "workplace dispute" (Pet. Br. 27), the PGA argues that Martin may not invoke the protection of Title III (which provides private plaintiffs injunctive but not monetary relief for disability-based discrimination by public accommodations, see 42 U.S.C. § 12188(a)(1)).

The PGA is correct that Title I – which specifically and extensively addresses the treatment of "employees" in the terms and conditions of employment – creates the exclusive Americans with Disabilities Act cause of action for disability discrimination by a place of public accommodation against one of its employees.[6] Where the plaintiff is not an employee of the defendant, however, Title I

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[6] Thus, a reading that extends Title III protection to Martin does not threaten to extend the Act's prohibitions on employment discrimination to businesses with fewer than 15 employees. Cf. Pet. Br. 28-29 & n.22. Because Title I is the sole

simply does not apply. In such circumstances, the availability of a claim under Title III cannot turn on the textually unmoored and essentially standardless inquiry into whether the plaintiff's claim is *really* one of "workplace discrimination." Rather, it must turn on the inquiry required by Title III's text: Whether the plaintiff has been denied equal access to "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a).

For these purposes, it is irrelevant that, in seeking access to the PGA Tour's "goods, services, facilities, privileges, advantages, or accommodations," Martin hopes to meet with enough success in competition to make a living. Professional gamblers frequently seek to use the services of casinos and racetracks – which are clearly "place[s] of . . . entertainment," 42 U.S.C. § 12181(7) – with a similar goal, as do sellers at baseball card shows and flea and farmers' markets. Nothing in the statutory text or legislative history suggests that a place of public accommodation should be free to discriminate against these individuals on the basis of disability simply because they hope to use the accommodation's services to earn a living.

Contrary to the argument of the PGA and its *amicus* (Pet. Br. 27; EEAC Br. 13-14), Martin's case is a far cry from that of a typical contractor or vendor who agrees to provide a defined set of goods or services to the operator of an accommodation in exchange for a defined payment. Unlike such an individual, Martin paid a $3000 fee and participated in an essentially open competition to obtain

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ADA provision that prohibits discrimination by a place of public accommodation against one of its "employees," its limitation to employers who have 15 or more employees necessarily reflects a determination *not* to regulate the relationships that smaller employers have with their employees.

the variety of "services, facilities, privileges, advantages, or accommodations" inherent in participation in PGA Tour events: the assembly of a top-flight field of competitors; the coordination of play at an agreed-upon location under an agreed-upon set of rules; access to an audience assembled by the tour; and the opportunity, *should he be successful in the competition* (see Tr. 815-817), to obtain prize money. Title III prohibits the Tour from denying these benefits to Martin on the basis of his disability.

II. The District Court Properly Held That Modification of the "Walking Rule" Would Not "Fundamentally Alter" PGA Tour Golf.

A. Title III Required the PGA to Demonstrate That Its Insistence on the Walking Rule Was Necessary to Serve a "Fundamental" Purpose of the Tour.

Some of the most significant burdens on people with disabilities take the form of longstanding practices that, without any particular design, exclude people with disabilities from important activities. These practices often continue simply because they reflect the "way things have always been done." See *Alexander* v. *Choate*, 469 U.S. 287, 295-296 (1985) (observing that Congress described the problem of discrimination against people with disabilities as largely one of "thoughtlessness and indifference" and "apathetic attitudes"). To combat this important form of exclusion, the ADA aims centrally to compel *all* of the entities it regulates – places of public accommodation as well as private employers and state and local government entities – carefully to scrutinize those practices that exclude people with disabilities. Title III thus defines "discrimination" to include (42 U.S.C. § 12182(b)(2)(A)(ii)):

> a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such

> goods, services, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.[7]

By requiring "reasonable modifications" that alter, but do not "fundamentally" alter, the nature of a public accommodation's operations, Title III requires a close examination of practices that operate to exclude individuals with disabilities. This examination must necessarily be fact-specific, and it must contain several components. First, the challenged practice must *in fact* serve the purposes for which the public accommodation imposed it in the first place. If the practice no longer serves that purpose, and is being continued simply because of inertia, modification could not effect a "fundamental alteration." See *Southeastern Community Coll.* v. *Davis*, 442 U.S. 397, 412 (1979) ("insistence on continuing past requirements" would discriminate on the basis of disability where it "arbitrarily deprive[s] genuinely qualified handicapped persons of the opportunity to participate in a covered program").

Even if the challenged practice serves *some* legitimate purpose of the public accommodation, it must be modified if reasonable alternatives exist that would permit an

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[7] ADA Title II, which regulates state and local government entities, also contains a requirement of "reasonable modifications" subject to a "fundamental[ ] alter[ation]" defense. 28 C.F.R. § 35.130(b)(7). ADA Title I, which regulates employers, similarly requires "reasonable accommodations" subject to an "undue hardship" defense. 42 U.S.C. § 12112(b)(5)(A). Although Title I's "undue hardship" defense differs somewhat from the "fundamental alteration" defense applied under Titles II and III, the core requirements of "reasonable accommodation" and "reasonable modification" are essentially the same.

individual with disabilities access without compromising that purpose. It might be possible to alter the practice for *all* people with a given disability without impairing its underlying purpose.[8] Alternatively, it may be the case that alteration of the practice for a given individual with a disability will, for reasons specific to that individual's particular circumstances, be consistent with the practice's underlying purpose.[9] And even if no alternative way of serving a legitimate purpose exists, the plain text of the statute makes clear that the practice may still be modified if the purpose itself is not "fundamental" to the public accommodation's operations.

These inquiries would be entirely frustrated if entities covered by the ADA could simply define the "fundamental" nature of their programs as encompassing the precise set of policies, practices, and procedures that they currently impose. In its jurisprudence under the Rehabilitation Act, this Court has made clear that defendants may not evade the reasonable modification requirement through such definitional fiat. See *Choate*, 469 U.S. at 301 & n.21 (stating that "[t]he benefit itself, of course, cannot

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[8] *See, e.g., Crowder* v. *Kitagawa*, 81 F.3d 1480, 1485-1486 (9th Cir. 1996) (although rule requiring quarantine of all dogs arriving from out of state served the legitimate interest in keeping Hawaii rabies-free, Title II's "reasonable modifications" requirement compelled consideration of whether alternative measures could serve the same purpose without effectively preventing people with visual impairments who use guide dogs from traveling to the state).

[9] *See, e.g., Washington* v. *Indiana High Sch. Athletic Ass'n, Inc.*, 181 F.3d 840, 852 (7th Cir.) (upholding preliminary injunction requiring waiver of high school athletic association's 8-semester eligibility rule for a student with a learning disability based in part on a determination that, due to the specifics of the student's situation, "none of the dangers that motivated adoption of the rule is present in this case"), cert. denied, 120 S. Ct. 579 (1999).

be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled"); see also 42 U.S.C. § 12201(a) (ADA must be interpreted to provide at least as much protection as the Rehabilitation Act); *Bragdon* v. *Abbott*, 524 U.S. 624, 631-632 (1998) (same).[10] The PGA thus cannot avoid a defense of its walking rule simply by defining PGA Tour golf as a game in which competitors walk between shots. It must "demonstrate[ ]" that a modification of that rule will "fundamentally alter" the nature of its operations under the standards set forth above. 42 U.S.C. § 12182(b)(2)(A)(ii).

B. The District Court Properly Concluded That Insistence on the Walking Rule Was Unnecessary to Serve Any "Fundamental" Purpose of the PGA Tour.

1. The PGA contends that modification of the walking rule effects a fundamental alteration by compromising its interest in imposing "a uniform set of substantive rules" on all of its competitors. Pet. Br. 31. The PGA's repeated references to the need for "uniform rules," "the same rules," and "common rules" (see Pet Br. 30, 31, 32-33, 34, 35, 36) reflect a basic misreading of the injunction issued by the district court and affirmed by the court

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[10] Congress made the same point clear in the parallel ADA provisions that guarantee "reasonable accommodations" to employees with disabilities so long as the accommodations do not compromise "essential" job functions. See 42 U.S.C. §§ 12111(8), 12112(b)(5)(A). While the "employer's judgment as to what functions of a job are essential" is entitled to "consideration," 42 U.S.C. § 12111(8), Congress pointedly accorded no deference or presumptive weight to that judgment, see H.R. Rep. No. 485, Pt. 3, 101st Cong., 2d Sess. 33 (1990) ("An amendment that would have created a presumption in favor of the employer's determination of essential functions was rejected.").

of appeals. The district court ordered the PGA "to provide Plaintiff with automotive transportation in NIKE TOUR and PGA TOUR competitions." J.A. 90. But nothing in that order prevents the Tour from waiving its walking rule for all other competitors. Indeed, the PGA responded to the district court's preliminary injunction by lifting the walking rule uniformly for all golfers in the qualifying school tournament. Pet. App. 43a. If the district court's *permanent* injunction has led to disuniformity in the rules applied to PGA Tour competitors, that disuniformity is entirely of the Tour's making.

Because the PGA can satisfy its interest in uniformity by waiving the walking rule for all competitors, it cannot argue that the rule is necessary to serve that interest. Rather, it must rest on the contention that the walking rule is, considered on its own merits, a fundamental aspect of PGA Tour competition, such that elimination of the rule would constitute a "fundamental[ ] alter[ation]." 42 U.S.C. § 12182(b)(2)(A)(ii). Evaluation of this argument requires consideration of the distinctive aspects of top-level professional athletic competition.

2. As the PGA forcefully contends (Pet. Br. 32-33), top-level professional sports are distinctive in respects that relate to the fundamental alteration inquiry. At the outset, however, two key respects in which top-level professional athletics are *not* distinctive bear emphasis.

First, although top-level professional sports leagues have traditionally been accorded broad authority to craft – and resolve disputes concerning – their rules (cf. ATP Br. 7-8), that fact hardly distinguishes those leagues from a wide range of other entities whose conduct is regulated by the ADA. Employers, for example, traditionally had the unquestioned managerial prerogative to define job functions and set work rules for all employees, but Title I's "reasonable accommodation" requirement necessarily overrides that prerogative. 42 U.S.C. § 12112(b)(5)(A). Moreover, many of the persons who are subject to the

requirements of ADA Title III are members of professions that traditionally have a significant degree of autonomy over the practices they follow. But this Court has rejected broad deference either to the judgments of individual professionals, see *Bragdon*, 524 U.S. at 649, or to the professional organizations of which they are members, see *id.* at 652.

Even when this Court has accorded a measure of deference to the judgments of nonjudicial bodies on questions associated with "reasonable modification," it has never deferred to the judgments of defendants as such. It has deferred only to identified professionals who, because of their training and professional orientation, have an obligation (regardless of what the defendant instructs) to take seriously the interests of people with disabilities *as well as* the concerns raised by the defendant. In *School Bd.* v. *Arline*, 480 U.S. 273, 287-288 (1987), this Court held that courts "normally should defer to the reasonable medical judgments of public health officials" on safety risk questions, in order to "protect[ ] handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks." See also *Bragdon*, 524 U.S. at 650 (reaffirming this aspect of *Arline* but noting that the views of public health officials "are not conclusive"). In *Olmstead* v. *L.C.*, 527 U.S. 581, 602-603 (1999), the Court stated that "the State generally may rely on the reasonable assessments of its own professionals in determining whether an individual meets the essential eligibility requirements for habilitation in a community-based program" – a statement necessarily premised on the expectation that those treating professionals exercise their own independent judgment based on knowledge and experience concerning both the individual with a disability and the ability of community placement to serve that individual. Because

sports leagues have no obligation, independent of the ADA, to safeguard the interests of people with disabilities,[11] there is no basis for according them even the moderate degree of deference that this Court has granted to public health officials and treating professionals in other contexts – particularly in a case, such as this one, where the league itself is the defendant.

Second, the mere fact that a covered entity must conduct an individualized inquiry to determine what modifications are necessary to provide the plaintiff access in the light of his particular condition is hardly unique to the professional sports context. Such an individualized inquiry is the basic point of the reasonable accommodation/reasonable modification requirement. See *Arline*, 480 U.S. at 287 & nn.16-17. The statutory text makes this clear: Public accommodations must provide reasonable modifications where those modifications are "necessary to afford" its opportunities to "*individuals* with disabilities." 42 U.S.C. § 12182(b)(2)(A)(ii) (emphasis added); see also 42 U.S.C. § 12112(b)(5)(A) (ADA Title I requires "reasonable accommodations to the known physical or mental limitations of *an* otherwise qualified *individual* with a disability") (emphasis added). If the burden of conducting individualized inquiries sufficed to work a fundamental alteration (cf. USGA Br. 25), the core aspect of the reasonable accommodation/reasonable modification requirement would be entirely eviscerated.

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[11] Professional athletic leagues have not always been reliable in effectuating the principles of our civil rights laws. See Paul C. Weiler, Leveling the Playing Field: How the Law Can Make Sports Better for Fans 18-19 (2000) (describing historical treatment of African-Americans by sports leagues and noting that "it was not until the early 1960s, when Congress was preparing to subject *private* organizations to a new Civil Rights Act, that the PGA relented and gave black golfers the right to play on the Tour").

3. Nonetheless, there are some respects in which alterations to the rules of top-level professional sports raise issues that are not present in the typical reasonable modification or reasonable accommodation case. In the typical case in which the plaintiff seeks such a modification or accommodation, the defendant's operations are the means to an end. An employer, for example, seeks to produce goods or provide services to paying members of the public. All work rules are intended to serve that ultimate goal of the enterprise. In a meaningful sense, however, top-level professional athletic competitions are not means to an end; they are an end in themselves.

Because the rules that determine the skills tested by the game are set in an essentially arbitrary manner, many of the inquiries that are relevant in other fundamental alteration cases are less appropriate in the top-level professional sports context. In a typical employment case, for example, an employee with a disability can attempt to prove that the employer should not demand of its warehouse workers the ability to carry more than fifty pounds at a time, because alternative means such as a hand truck exist to allow those workers to accomplish the tasks necessary for the employer. See, *e.g.*, EEOC, ADA Tech. Asst. Man. § I-3.8. In a typical case challenging testing practices, a test-taker with a disability can attempt to prove that the test, as currently structured, does not in fact evaluate him on the essential skills that it was designed to assess. See, *e.g.*, 28 C.F.R. § 36.309(b)(3). Because the skills a top-level professional sports league chooses to test are not means to any particularly defined end, however, courts lack any particular standard for second-guessing the league's choice of *which* skills tested by the competition's rules are truly essential, and *how*

much the competition's outcome should turn on a particular skill.[12]

The rules of top-level professional sports are not immune from the statutorily mandated reasonable modification and fundamental alteration analysis, however. In determining whether a rule that excludes people with disabilities serves a *fundamental* purpose, courts must assess whether that rule *in fact* tests the skills that the league purports to be testing. In many if not most cases involving rules of competition in top-level professional athletics, that determination can be expected easily to support the league's choice of rules. For example, one would expect that a professional basketball league's decision to set the basket 10 feet above the floor could plainly be shown to test leaping and jump-shooting skills; once that point was established, a court would have no basis for saying that the league should have tested those skills more (by setting the basket higher) or less (by setting it lower). But the fact that the league's burden of justification will in many cases be *easy* does not excuse the league from its statutory obligation to "demonstrate[ ]," 42 U.S.C. § 12182(b)(2)(A)(ii) that a proposed rule change would alter the skills the game tests. The league must carry this burden by presenting competent evidence and not mere speculation. Cf. *Bragdon*, 524 U.S. at 653-654 (speculative evidence insufficient to establish sufficient safety risk to justify disability-based discrimination).

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[12] These concerns are unique to top-level professional athletics. In recreational and scholastic sports, participatory and educational goals compete with the interest in determining a winner under a given set of rules. See, *e.g.*, *Washington*, 181 F.3d at 852 (upholding preliminary injunction requiring waiver of high school athletic eligibility rule on the ground that the waiver would, in the plaintiff's circumstances, be compatible with the educational purposes of the rule). Determination of the essentiality of a given skill to the sport is therefore far more appropriate.

Of course, elimination of any rule that excluded a person with a disability will have an effect on competitive outcomes by changing the field of competitors. If people with disabilities cannot play, they have no chance to win, so letting them play is obviously outcome-affecting in some sense. But a rule whose only effect on outcomes is to *exclude individuals from competing* rather than to *test the skills of those who are competing* cannot be "fundamental" to the competition. If, for example, the PGA required all golfers to wear a particular kind of shoe as a result of an endorsement deal, and that kind of shoe could not fit a person with a prosthetic foot, elimination of that requirement would affect competitive outcomes by permitting people with prosthetic feet to play. But such a modification would not affect the nature of the competition at all. It would merely eliminate a gratuitous exclusion of people with disabilities. Such gratuitous exclusions are precisely the type of conduct that Title III seeks to attack.

4. Applying these standards, it is evident that the district court correctly held that waiver of the walking rule would not effect a fundamental alteration. The district court's findings make clear that the walking rule *does not* test the skill that the Tour purports to be testing. Any effect that rule has on the outcome of competitions is speculative at best.

The district court found that the asserted "purpose of the walking rule is to inject the element of fatigue into the skill of shotmaking." Pet. App. 32a. The court did not second-guess the appropriateness of testing the skill of shotmaking under conditions of fatigue. See Pet. App. 33a (finding that such a purpose "is a cognizable purpose of the rule from the standpoint of the ADA") (footnote omitted). But it did review the evidence to decide whether the walking rule does *in fact* inject a fatigue factor into the game. Distinguishing between the "normal circumstances" (Pet. App. 33a) of other Tour competitors

and "Casey Martin's unique circumstances" (Pet. App. 35a),[13] the court found that "the fatigue factor injected into the game of golf by walking the course cannot be deemed significant under normal circumstances." Pet. App. 33a.

The court gave several reasons for this finding. It credited the expert testimony of a physiology professor who stated that a course of golf involves walking five miles over the course of five hours, with "numerous intervals of rest and opportunities for refreshment." Pet. App. 33a. The expert also testified that "fatigue at lower intensity exercise is primarily a psychological phenomenon." Pet. App. 34a. According to that expert, the prominent case of allegedly walking-induced fatigue relied upon by the PGA ("Ken Venturi's memorable 1964 U.S. Open win") resulted from "heat exhaustion and fluid loss – not walking." Pet. App. 33a. Moreover, the court found, "most PGA Tour golfers appear to prefer walking as a way of dealing with the psychological factors of fatigue." Pet. App. 34a. These findings make clear that the walking rule does not in fact serve as a test of the ability to overcome fatigue, and that it could be eliminated for all competitors without effecting a fundamental alteration. *A fortiori*, the relief ordered by the district court – requiring the PGA to waive the rule for Casey Martin but leaving it up to the Tour to decide whether to eliminate the rule for all other competitors – does not effect a fundamental alteration.

The court of appeals did not disturb these findings, and the PGA does not challenge them in this Court as clearly erroneous. Instead, the PGA reads the statement that "the fatigue factor injected into the game of golf by

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[13] The walking rule does not exclude Martin because it makes him so fatigued that his shotmaking suffers; it excludes him because he simply cannot walk the course. Pet. App. 9a, 18a 32a.

walking the course cannot be deemed significant under normal circumstances" (Pet. App. 33a) as necessarily implying that "the 'walking rule' *does affect* the outcome of some high-level golf tournaments." Pet. Br. 36 (emphasis in original). To the extent that the district court's findings are ambiguous on this point, the proper course for this Court is to remand rather than supply a missing factfinding by the device of negative implication. See *Pullman-Standard* v. *Swint*, 456 U.S. 273, 291-292 (1982). But the PGA's submission to this Court does not demonstrate that the walking rule has such an outcome-determinative effect on high-level golf tournaments in any event.

The PGA argues that some unspecified number of golfers without statutory "disabilities" are unusually likely to experience fatigue from walking and thus would benefit in the competition from being able to use a golf cart. PGA Br. 39-41. But that is nothing more than speculation. Nothing in the district court's findings – much less in the brief portion of the record cited by the PGA (PGA Br. 40 (citing J.A. 168-169, in which a single golfer testified that he experienced fatigue because of his diabetes)) – suggests that an across-the-board elimination of the walking rule would have any meaningful effect on the outcome of the competition.[14] The Tour can do nothing more than assert that some unidentified number of golfers with "bad backs, sore knees and ankles, arthritis,

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[14] The USGA states that waiver of the walking rule affected the outcome in at least one competition that Casey Martin won on the Nike Tour after the district court issued its order. USGA Br. 23-24 n.9. According to the USGA, Martin won a tournament by one stroke over an opponent who "was suffering from an ingrown toenail that caused him to suffer intense pain"; had the opponent been permitted to use a golf cart, the USGA asserts, "he might have improved his score by one or two strokes." USGA Br. 23 n.9. Like the assertions in the PGA's brief, this "might have" is entirely speculative.

[and] diabetes" (Pet. Br. 40) might do somewhat better *vis-a-vis* some of their fellow competitors if the walking rule were lifted. Because the chance that the walking rule has an effect on tournament outcomes is speculative at best, it cannot be said truly to test the skill of shotmaking under fatigue.

Given the entirely speculative effect that walking the course has on golfer fatigue, it is hardly surprising that the district court noted that Martin experiences far more pain and fatigue simply by getting in and out of his cart to walk to shots. See Pet. App. 36a. Contrary to the PGA's suggestion (Pet. Br. 39-41), this passage of the district court's opinion does not require the Tour to seek some kind of precise calibration between the advantage gained by a reasonable modification and the disadvantage imposed by the plaintiff's disability. Rather, the passage emphasizes that, should the Tour choose to limit waiver of the walking rule to Casey Martin, it would nonetheless be quite obvious that Martin would receive no competitive advantage. See Pet. App. 36a (noting that Martin "*easily* endures greater fatigue with a cart than his able-bodied competitors do by walking") (emphasis added); *ibid.* ("To perceive that the cart puts him – with his condition – at a competitive advantage is a gross distortion of reality."). Given the district court's unchallenged findings, the speculative nature of the PGA's assertion that the walking rule affects the competition, and the fact that the PGA remains free to eliminate the rule for all golfers, this "competitive advantage" point was unnecessary to the district court's decision. For in no event did the PGA carry its burden to "demonstrate[ ]" a "fundamental[ ] alter[ation]." 42 U.S.C. § 12182(b)(2)(A)(ii).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

Amici Descriptions

AARP is a nonprofit membership organization serving more than thirty-four million persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. The protections of the American with Disabilities Act are especially important to AARP members because older persons have a higher incidence of disabilities than other populations.

ADAPT is a national organization, most of whose members have severe disabilities and have been institutionalized in nursing facilities and other public institutions solely because they have disabilities. ADAPT has a long history and record of enforcing the civil rights of people with disabilities and was one of the key organizations that participated in the political and legislative process that resulted in the passage in 1990 of the Americans with Disabilities Act.

The **American Association of People with Disabilities** (AAPD) is a non-profit, non-partisan membership organization of people with disabilities, their family members and supporters. AAPD was founded on the fifth anniversary of the Americans with Disabilities Act and works to promote policies and programs that further the ADA's goals of equality of opportunity, full participation, independent living and economic self-sufficiency for the more than 56 million children and adults with disabilities in the U.S.

The **American Council of the Blind** (ACB) is a national membership organization of blind and visually impaired persons and is dedicated to improving the quality of life, independence and equality of opportunity for

people who are blind and visually impaired. One key element of ACB's activities has been support for legislation that would enhance and protect the civil rights of persons with disabilities such as the Americans with Disabilities Act.

The **American Diabetes Association** is the nation's leading nonprofit health organization providing diabetes research, information and advocacy. The mission of the organization is to prevent and cure diabetes, and to improve the lives of all people affected by diabetes. As part of its mission, the Association advocates for the rights of people with diabetes and supports strong public policies and laws to protect persons with diabetes against discrimination.

The **American Network of Community Options and Resources** (ANCOR) is a nationwide association of 700 private, non-profit, for-profit and family care agencies that together provide support and services to more than 150,000 people with disabilities. Most member agencies support group homes, apartments, and other supported living arrangements in typical, stable family neighborhoods in order to best meet the needs of the people they support. Some members provide vocational and employment services through supported employment, community rehabilitation programs, and extended employment arrangements.

The **American Therapeutic Recreation Association** is the largest national membership organization representing the interests and need of recreational therapists. Recreational therapists are health care providers using

recreational therapy interventions for improved functioning of individuals with illness or disabling conditions.

The Arc of the United States (The Arc), through its nearly 1,000 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and their families. Since its inception, The Arc has vigorously challenged attitudes and public policy, based on false stereotypes, that have authorized or encouraged segregation of people with mental retardation in virtually all areas of life.

The **Association on Higher Education and Disability** (AHEAD) is a non-profit organization committed to full participation in higher education and equal access to all curricular and extra-curricular opportunities for persons with disabilities. Its membership includes approximately 2,000 institutions (including colleges, universities, not-for-profit service providers and standardized testing organizations), professionals, and college and graduate students planning to enter the field of disability practice.

The **Judge David L. Bazelon Center for Mental Health Law** is a national legal advocacy organization dedicated to advancing the rights and dignity of people with mental disabilities. The Center has worked to promote equal opportunity for people with mental disabilities to access housing, employment, services and recreational activities.

The **Brain Injury Association** (BIA) is a national non-profit organization whose mission is to create a better

future through brain injury prevention, research, education and advocacy. BIA's leadership represents a cross section of stakeholders in the field of brain injury, including survivors, family members, medical and clinical practitioners, researchers, and service providers. Since its inception, BIA has worked tirelessly to raise public awareness, prevent brain injury by education, improve treatments through professional education and research, and advocate for progressive change in the law.

The **Brain Injury Family Assistance Center** is committed to assisting individuals with Traumatic Brain Injuries and their families in dealing with the many problems caused by and associated with the injury, including but not limited to employment and access problems.

The **Center on Disability and Health** is a nonprofit health care policy think tank committed to applying nondiscrimination standards in the Americans with Disabilities Act to different components of the health care delivery system.

The **Disability Rights Education and Defense Fund** (DREDF) is a national law and policy center dedicated to advancing and protecting the civil rights of people with disabilities. Since its founding in 1979, DREDF has pursued its mission through education, advocacy and law reform efforts, consistently working to promote the full integration of citizens with disabilities into the American mainstream. DREDF is nationally recognized for its expertise in the interpretation of federal disability civil rights laws.

The **Epilepsy Foundation®** is the sole national charitable voluntary health organization dedicated to advancing the interests of the more than two million people with epilepsy and seizure disorders. Since its inception, the Foundation has worked for the full inclusion of people with epilepsy in everyday, mainstream activities by dispelling the stigma associated with seizures and supporting the development of laws that protect individuals from discrimination based on these stereotypes and fears.

HalfthePlanet Foundation supports the applications of technology to promote the values of the Americans with Disabilities Act: independent living, social inclusion, equality of opportunity, economic self-sufficiency and empowerment. The vision of HalfthePlanet Foundation is a planet: where technology pervasively facilitates the dreams, aspirations, expectations and abilities of children and adults with disabilities, their families and friends; where everyone can contribute fully to the economic, social, and political well being of our local, national, international and virtual communities; and that fully recognizes and respects the civil and human rights of all its citizens, especially its citizens with disabilities.

Justice For All is a national disability rights organization whose goal is to defend and advance the full civil and human rights of Americans with disabilities.

The **Learning Disabilities Association of America** (LDA), is a national, non-profit, volunteer organization whose members are individuals with learning disabilities, their families and friends, and professionals. LDA is dedicated to enhancing the quality of life for all individuals with learning disabilities, to alleviating the restricting

effects of learning disabilities, and to supporting endeavors to determine the causes of learning disabilities.

The **National Alliance for the Mentally Ill** (NAMI), with more than 200,000 members and 1,300 state and local affiliates, is the Nation's leading grassroots advocacy organization dedicated exclusively to improving the lives of persons with severe mental illnesses.

The **National Association for the Advancement of Orthotics and Prosthetics** is a national non-profit trade association comprised of orthotists and prosthetists who design, fit and fabricate orthopedic braces and artificial limbs to meet the unique needs of millions of people with amputations and orthopedic impairments.

The **National Association of Developmental Disabilities Councils** (NADDC) represents approximately 40 Developmental Disabilities Councils around the country. NADDC's mission is to provide support and assistance to member Councils to promote a consumer and family centered system of services and supports.

The **National Association of Protection and Advocacy Systems** (NAPAS) is the membership organization for the nationwide system of protection and advocacy (P&A) agencies. Located in all 50 states, the District of Columbia, Puerto Rico, and the territories, P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities.

The **National Center on Accessibility** (NCA) provides education and technical assistance and conducts research on accessibility for people with disabilities in parks, recreation and tourism.

The **National Council on Independent Living** (NCIL) is a membership organization that advances the independent living philosophy and advocates for the human rights of, and services for, people with disabilities to further their full integration and participation in society. NCIL was established in 1982 and is the leading national, cross disability, grassroots organization run by and for people with disabilities.

National Federation of the Blind (NFB) is the leading national organization of blind persons, with affiliates in all 50 states, the District of Columbia and Puerto Rico. Most of its approximately 50,000 members are blind. NFB is recognized by the public, Congress, governmental agencies, and the courts as a collective and representative voice of blind Americans and their families. NFB promotes the general welfare of the blind by (1) assisting the blind to integrate themselves into society on terms of equality and (2) removing barriers and changing social attitudes, stereotypes and mistaken beliefs concerning blindness that are held by sighted and blind persons and that result in the denial of opportunity to blind persons in virtually every sphere of life.

The **National Health Law Program** is a non-profit, legal support center that works to improve justice in health care for low income people, people with disabilities, children, and people of color. For over 30 years, the National Health Law Program has worked on behalf of

these populations to assure that they receive the full protection of federal and state laws designed to ensure and expand access to health care services.

The **National Mental Health Association**, is a national organization with over 330 affiliates dedicated to promoting mental health, preventing mental disorders, and achieving victory over mental illness, as well as respect, dignity, and opportunities for persons with disabilities.

The **National Multiple Sclerosis Society**, with over 600,000 members and 83 chapters and divisions, is dedicated to ending the devastating effects of multiple sclerosis (MS). The Society focuses on providing services, information, and programs to persons with MS and funding for MS biomedical research and health services research. The Society supports efforts to increase accessibility and independence, as well as to prevent discrimination.

The **National Therapeutic Recreation Society** (NTRS) is a membership organization for those who are interested in the provision of therapeutic recreation services for persons with disabilities in clinical facilities and in the community. The National Therapeutic Recreation Society advocates for the leisure rights of individuals with illnesses, disabilities, and other conditions, and actively seeks to correct inequities that unjustly discriminate. **Paralyzed Veterans of America** (PVA) is a congressionally chartered veterans service organization with over 19,000 members. Virtually all of PVA's members use wheelchairs for mobility and are people with disabilities as defined by the Americans with Disabilities Act. PVA

has a vibrant sports and recreation program that involves many of its members.

The **Polio Society** serves its nationwide membership with information and referral services, training in self-advocacy to enforce the civil rights of persons with disabilities, and support for legislation of benefit to polio survivors and the disability community at large. Polio Society members are persons with disabilities as a result of polio and post-polio syndrome.

Self Help for Hard of Hearing People (SHHH) is a nonprofit consumer educational organization, founded in 1979 and devoted to the welfare and interests of those who cannot hear well, their relatives, and friends. SHHH has 20,000 national and chapter members in 50 states. It is the largest consumer organization in the United States representing people with hearing loss. As the voice for hard of hearing people, SHHH strives to improve the quality of life for hard of hearing people through education, advocacy, and self help.

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IN THE

Supreme Court of the United States

PGA TOUR, INC.,

Petitioner,

v.

CASEY MARTIN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* K-T SUPPORT GROUP IN SUPPORT OF RESPONDENT

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THE INTEREST OF THE *AMICUS CURIAE*[1]

The K-T Support Group ("Support Group") is a non-profit, tax-exempt organization incorporated under the laws of Minnesota that originated as a private, unincorporated, not-for-profit membership association in 1986. The Support Group's mission is to provide support for Klippel-Trenaunay ("K-T") Syndrome patients and their families.[2] The Support Group is an associate member of the National Organization of Rare Disorders. Among its activities, the Support Group: provides a clearinghouse for correspondence between members; maintains and makes available a list of current medical literature pertaining to K-T Syndrome; conducts bi-annual meetings of patients and families in Rochester, Minnesota, in conjunction with optional appointments at the Mayo Clinic; distributes a periodic newsletter of shared experiences; maintains an internet web page;[3] and generally acts as a support

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1. Letters from each party consenting to the filing of this brief have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part. The only entity that made a monetary contribution to the preparation or submission of this brief other than the *amicus curiae*, its members, or its counsel, was the Texas Tech Law School Foundation, which provided funds for the printing costs.

2. Respondent Casey Martin has been diagnosed with Klippel-Trenaunay-Weber Syndrome. The medical community has frequently used the terms Klippel-Trenaunay Syndrome and Klippel-Trenaunay-Weber Syndrome interchangeably. *See Description of Klippel-Trenaunay Syndrome*, <http://www.k-t.org/description.html> (also including a detailed description of the symptoms and etiology of K-T Syndrome). K-T Syndrome has been defined as "a rare congenital malformation characterized by the triad of arteriovenous or capillary vascular malformations, atypical varicosities, and bony or soft tissue hypertrophy usually affecting one extremity." Anila G. Jacob et al., *Klippel-Trenaunay Syndrome: Its Spectrum and Management*, <http://www.k-t.org/proceed.html> (discussing a Mayo Clinic study of 252 K-T Syndrome patients seen from 1956 to 1995).

3. *See K-T Support Group Home Page*, <http://www.k-t.org>.

group for sharing experiences and information about this rare disorder.[4]

The Support Group is the most knowledgeable entity in the country with respect to the extremely rare disability that affects the Respondent, Casey Martin. Although no two cases of K-T Syndrome are exactly alike, Support Group families know well the physical, emotional, and spiritual endurance and stamina required to live every day with this rare, complex, disfiguring, and often disabling condition of birth.

An inability to walk distances is frequently associated with K-T Syndrome when the condition affects the person's legs or feet. Because of a host of complicating factors — such as bone anomalies, bleeding and clotting disorders, blood pooling, poor circulation, lymphedema, and pain — many persons with K-T Syndrome, like Casey Martin, must often limit extensive walking, running, jumping, and other strenuous physical activities. Because of the availability of golf carts, however, golf is one competitive sport in which such persons can fully participate.

SUMMARY OF ARGUMENT

Put simply, this case is about discrimination. Respondent Casey Martin overwhelmingly proved to the District Court that he has a disability that affects his ability to walk, that he is capable of excellence in the sport of golf, that a modest modification — the use of a golf cart — will permit him to compete in competitions and on golf courses operated by Petitioner PGA Tour, Inc. ("PGA"), and that this modification is not a fundamental alteration of the sport. Nonetheless, the PGA wants this Court to permit it to discriminate against Casey Martin on the basis of his disability notwithstanding the ADA.

Title III of the ADA applies to the PGA in its operation of golf courses for purposes of its competitive events. This conclusion is compelled by the plain meaning of Title III which

4. Counsel for *Amicus Curiae* Support Group is a member of the Support Group and has a 9 year-old daughter who has K-T Syndrome. Counsel also is immediate past chair of the State Bar of Texas Disability Issues Committee.

precludes discrimination against an "individual . . . on the basis of disability" by any person who "operates a place of public accommodation" with respect to the "full and equal enjoyment of . . . the services, facilities, privileges, advantages, or accommodations" of the "place of public accommodation." 42 U.S.C. § 12182(a). Title III also *specifically* defines "discrimination" to include the "failure to make reasonable modifications in policies, practices, or procedures . . . to individuals with disabilities" absent a demonstration by the public accommodation that such modifications would "fundamentally alter the nature" of the public accommodation. *Id.* § 12182(b)(2)(A)(ii). The statute specifically lists a "golf course" as a place of public accommodation (*id.* § 12181(7)(L)); thus, owners and operators of golf courses are covered by Title III. Alternatively, the PGA operates places of "exhibition or entertainment," which are also covered by Title III. *Id.* § 12181(7)(C).

Despite this explicit coverage in the statute, the PGA has urged this Court to find that because Martin can earn prize money in PGA events, his claim is more of a Title I employment action rather than a matter covered by Title III. This argument is specious. The list of public accommodations covered by Title III is extensive. Many owners and operators of public accommodations owe duties to employees under Title I *and* members of the public under Title III. Some of these members of the public — for example, guest lecturers or entertainers at a private college — might also be paid by the public accommodation. Title III requires that they have reasonable access to the college's performing areas. Similarly, many small employers with fewer than 15 employees have no Title I obligations, but must comply with Title III in providing access to people with disabilities. In sum, the PGA continues in its quest to bifurcate the golf course into zones admittedly covered by Title III (for the gallery of fans) and playing areas within the place of public accommodation that are purportedly exempt. In this, the PGA misconstrues Title III. The ADA was not intended

solely to increase access for persons with disabilities to *attend* places of public accommodation as spectators; it also speaks to *participation* in public accommodations by persons with disabilities. A decision that Title III does not reach the playing areas during PGA events would allow the PGA to discriminate at will against all persons with disabilities who are otherwise qualified to compete, to serve as caddies, to serve as scorekeepers or in any other position ordinarily found "within the gallery ropes."

The lower courts also correctly found — in light of Casey Martin's disability — that *his* use of a golf cart is a reasonable modification that does not fundamentally alter the sport of pro golf. The PGA has conceded that Martin has a disability that is covered by the ADA. Nonetheless, despite Title III's requirements, the PGA adamantly refused to make any type of individualized inquiry about Martin's specific condition or how his request for a cart related to his disability. Given that a golf cart is a reasonable modification to accommodate Martin's disability, the PGA had the burden of demonstrating that Martin's cart use would fundamentally alter the nature of the public accommodation. The PGA did not meet that burden.

The game of golf, even at its most prestigious levels, is all about shot-making and getting the ball from the tee to the green, and then into the hole in the fewest strokes. It is not about walking, and it's not about how one gets from one shot to the next. Even the PGA has allowed cart use for all golfers in its Senior Tour and in portions of its Qualifying Tournament. Martin's use of a cart for moving about the course does not alter the competition at all — much less in some fundamental way. Martin did not request to get a "head start" on each hole by teeing his ball from a different spot from other competitors, and he did not ask to throw the ball instead of striking it with a club. He wants to compete in a sport in which he has mastered the primary and fundamental skills: striking and putting a golf ball with a minimum of strokes. Although the District Court recognized that walking injects some fatigue into the game, the

PGA has largely ignored the findings, entered after a six-day trial, that Martin's fatigue and pain, even with cart use, is greater than other able-bodied competitors. In sum, because of his disability, Martin cannot walk the full course. Allowing him to ride a cart is a simple accommodation for *his individual* disability, and it allows him a chance to compete on a level playing field. It provides no advantage; it just gives him the type of opportunity that the ADA is all about.

ARGUMENT

I. THE LOWER COURTS CORRECTLY HELD THAT TITLE III OF THE ADA APPLIES TO THE PGA BECAUSE IT OWNS, LEASES, AND OPERATES PLACES OF PUBLIC ACCOMMODATION.

A. Title III Plainly Applies to the PGA.

A statute must be accorded its plain meaning. In the context of the ADA, this Court unanimously determined that notwithstanding contentions

> that Congress did not "envisio[n] that the ADA would be applied to [the matter under review]," in the context of *an unambiguous statutory text* that is *irrelevant*. . . . [T]he fact that a statute can be " 'applied in situations not expressly anticipated by Congress does *not demonstrate ambiguity. It demonstrates breadth.*' "

Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206, 212 (1998) (citations omitted) (emphasis added).

Title III of the ADA provides that "[n]o *individual* shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who . . . operates a place of public accommodation." 42 U.S.C. § 12182(a) (emphasis added). In turn, the statute *specifically prohibits* and defines as "discrimination" the failure by a private entity that owns, leases, or operates places of public accommodation "to make reasonable modifications in policies, practices, or procedures, when such

modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities" unless the private entity "demonstrates" that "making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations." *Id.* § 12182(b)(2)(A)(ii).

Moreover, Title III expansively defines "public accommodation" to include twelve categories of private entities and specifically identifies "a gymnasium, health spa, bowling alley, *golf course*, or other place of exercise or recreation." *Id.* § 12181(7)(L) (emphasis added). As the Ninth Circuit observed, "There is nothing ambiguous about this provision; golf courses are public accommodations." *Martin v. PGA Tour, Inc.*, 204 F.3d 994, 997 (9th Cir.), *cert. granted*, 121 S. Ct. 30 (2000). As an owner or operator of golf courses, the PGA is plainly covered by Title III.

As it did below, the PGA has continued to attempt to give the definition in section 12181(7)(L) a narrow reading by urging that the act only reaches golf courses when they are being used as places of exercise or recreation. As held by the Court of Appeals, this is not controlling:

> Even if we were to agree with this point, it would not aid PGA. The statute also defines 'public accommodation' to include a "theater, . . . stadium or other place of exhibition or entertainment." 42 U.S.C. § 12181(7)(C). If a golf course during a tournament is not a place of exercise or recreation, then it is a place of exhibition or entertainment.

Martin, 204 F.3d at 997. Indeed, under the implementing regulations, a "place of public accommodation" is defined as a facility that "fall[s] within at least one of the . . . [twelve] categories." 28 C.F.R. § 36.104 (1999).[5] Congress has plainly

5. There was no intent for the language, "other place of exercise or recreation," to be limiting. Instead, for each of the twelve categories (Cont'd)

addressed a wide variety of covered *places*, and the language in § 12181(7) does not purport to create exceptions for particular *uses* within those places.

In the courts below, as well as here, the PGA has attempted to create an artificial distinction between those parts of the golf course that are set up for spectators during its tournaments ("outside the ropes"), and the course's playing areas ("inside the ropes").[6] In this regard, the PGA likens the area outside the ropes to the seating area in a stadium or auditorium and suggests that Title III applies only to spectator areas, not places "inside the ropes" that are for competitors. This is a mistaken view of the ADA. The PGA has invited members of the public to qualify to play golf and compete on the golf courses it operates. As the Ninth Circuit stated with regard to the contention that the "golf course" during PGA tournaments is more like a place of exhibition or entertainment, "The statute does not restrict this definition to those portions of the place of exhibition that are open to the general public." *Martin*, 204 F.3d at 997. Although

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of public accommodations, "the legislation only lists a few examples and then, in most cases, adds the phrase 'other similar' entities." STAFF OF HOUSE COMM. ON EDUC. & LABOR, 101ST CONG., LEGIS. HISTORY OF P.L. 101-336, at 157 (Comm. Print 102-A) (from Senate Report). Congress intended "that the 'other similar' terminology should be construed liberally." *Id.* The ADA's history reveals further that the intent in subsection (7)(L) was to cover a broad spectrum of "other similar establishments" such as "[t]ennis courts, basketball courts, dance halls, playgrounds, . . . aerobics facilities, . . . video arcades, swimming pools, beaches, camping areas, fishing and boating facilities, and amusement parks." *Id.* Indeed, the drafters of the ADA intended to expand significantly from the public accommodations covered under the Civil Rights Act of 1964 (limited to lodging, eating, and entertainment). *See* NATIONAL COUNCIL ON DISABILITY, EQUALITY OF OPPORTUNITY: THE MAKING OF THE AMERICANS WITH DISABILITIES ACT, at 101-02 (1997).

6. At the District Court the PGA urged that is was *fully* exempt from the ADA under the exception for private clubs. The District Court properly rejected that argument, and the PGA did not appeal that ruling. *Martin v. PGA Tour, Inc.*, 984 F. Supp. 1320, 1323-26 (D. Oregon 1998).

the PGA would like this Court to so believe, 42 U.S.C. § 12181(7)(C) does not say, "limited to spectator areas." Of note, even the District Court in *Olinger* did not disagree with this viewpoint, and the Seventh Circuit did not disturb that holding. *See Olinger v. U.S. Golf Ass'n*, 55 F. Supp. 2d 926, 932 (N.D. Ind. 1999) ("ADA applies to the areas of competition . . . as well as to the gallery and the areas outside the ropes"), *aff'd*, 205 F.3d 1001, 1004 (7th Cir.) (not resolving Title III issue, but accepting USGA's "fundamental alteration" argument), *petition for cert. filed* (Sep. 20, 2000) (No. 00-434).

B. The PGA's Attempts to Narrow the Scope of Title III Lack Legal Support.

In this appeal, Petitioner has for the first time argued that the Respondent cannot seek relief under Title III of the ADA because Respondent hopes to play well and win prize money at PGA events. In essence, the PGA appears to be asserting that because Martin can earn prize money in PGA events, his claim is more of a Title I employment action rather than a matter covered by Title III. In addition, the PGA is now urging for the first time that all of the prohibitions included in Title III apply only to "clients and customers" of public accommodations. First, these arguments were neither briefed nor argued below and, accordingly, the Ninth Circuit did not address them. *See Yeskey*, 524 U.S. at 212-13 (observing in another ADA case that when an issue has neither been raised before nor considered by the Court of Appeals, then the Court "will not ordinarily consider" it). Even should the Court consider the arguments, however, they are without merit.

The District Court determined that Title I is inapplicable in this case given its holding that Martin is not a PGA employee. Indeed, the PGA has taken substantial steps to structure its business to avoid having its players be considered as employees. It does not follow, however, that Title III does not protect anyone who receives prize money or compensation from an operator of a public accommodation. The list of places and types of public accommodation included in Title III is extensive. And, Congress

has forbidden discrimination against "individuals" with disabilities at public accommodations. For example, a "private school" or the operator of an "auditorium," "lecture hall," or "concert hall" might hire a guest lecturer, entertainer, or other performer with a disability and pay that individual as an "independent contractor." *See* 42 U.S.C. §§ 12181(7)(C), (D), & (J). The PGA would have this Court hold that although attendees are covered by Title III, the speaker or performer would not be.

Similarly, a small law firm of less than 15 employees is exempt from Title I's employment provisions, but is still subject to Title III as a public accommodation. *Id.* § 12181(7)(F). The PGA's construction of Title III would limit the statute's applicability only to the firm's clients. This construction, however, excises any obligation to a myriad of other individuals who are not "clients or customers" of the firm who will need access to the firm's offices on any given day. These might include a person with a disability who is an opposing counsel, an expert witness, court reporter, jury consultant, mediator, messenger, or office equipment repairman. Indeed, many of these persons are non-employees who receive compensation from the firm. Similarly, a large law firm will have Title I obligations in its hiring practices and policies, and will have Title III obligations to a comparable list of persons.

Another example worth considering is a private college. It has Title I obligations to its employees, but also Title III obligations (*Id.* § 12181(7)(J)) to its students *and* a host of other non-employee individuals invited onto the campus, many of whom it might pay for services rendered. Just to name a few, those protected could include individuals with disabilities who are guest lecturers, entertainers, artists, accreditation officials, alumni, consultants, and student athletes from other schools or sports officials needing access to locker rooms and playing fields.[7]

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7. Similarly, a bank examiner with a disability must have access within a bank (*Id.* § 12181(7)(F)); a delivery person with a disability

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The PGA would also like this Court to hold that Congress intended Title III to apply only to "clients or customers" of public accommodations. Although that language appears in Title III, the PGA's argument overextends its reach. Title III first sets forth a *broad* general rule that an "individual" shall not "be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation . . . ." 42 U.S.C. § 12182(a). Subsection (b) of the statute is entitled, "Construction," and includes "General prohibitions" in subsection (b)(1) and "Specific prohibitions" in subsection (b)(2). The general prohibitions make certain proscribed activities such as "denial of participation," "participation in an unequal benefit," and provision of a "separate benefit" discriminatory if directed to "an individual or class of individuals on the basis of a disability" either "directly, or through contractual, licensing, or other arrangements." *Id.* §§ 12182(b)(1)(A)(i)-(iii). In turn, § 12182(b)(1)(A)(iv) states that "[f]or purposes of clauses (i) through (iii) of this subparagraph, the term 'individual or class of individuals' refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement." This subsection, however, does *not* purport to narrow the term "individual" as set forth in the general rule in § 12182(a).

The statute also sets forth in § 12182(b)(2) an array of "specific prohibitions" including the provision at the heart of this litigation, which makes it discriminatory for a public

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should be able to access a bakery, grocery store, clothing store, or shopping center (*Id.* § 12181(7)(E)); and a non-employee doctor with a disability must have access in a hospital (*Id.* § 12181(7)(F)). *See Menkowitz v. Pottstown Memorial Medical Center*, 154 F.3d 113, 123 (3d Cir. 1998). None of these individuals would likely be viewed as clients or customers. Also, would the PGA's construction eliminate Title III applicability to scholarship students at the private college? After all, they are being paid to participate.

accommodation to fail "to make reasonable modifications" in its "policies, practices, or procedures, when such modifications are necessary to afford such . . . facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate" a fundamental alteration. *Id.* § 12182(b)(2)(A)(ii). The "specific prohibitions" of § 12182(b)(2) simply do not include the "clients or customers" language set forth in one subpart of the "general prohibitions" of § 12182(b)(1)(A).

Also, as illustrated by the many examples set forth above, the PGA's attempt to narrow the applicability of Title III solely to "clients or customers" of all public accommodations listed at length in § 12181(7) defies common sense. Many people with disabilities visit or participate in the vast array of places of public accommodation included in § 12181(7) who cannot be viewed as "clients or customers." What, then, did Congress intend when it included this apparent limitation in § 12182(b)(1)(A)(iv)? The legislative history reveals that Congress was not focusing on the "clients or customers" aspect of the subpart in question, but instead was concerned that a public accommodation might try to contract away its ADA obligations. As stated in the House Report:

> The intent . . . is to prohibit a public accommodation from *doing indirectly through a contractual relationship*, what it *may not do directly*. Thus, the 'individual or class of individuals' referenced . . . has always been intended to refer to the clients or customers of the public accommodation that entered into a *contractual relationship*. The section has never been intended to encompass the clients or customers of *other* entities. Thus, a public accommodation is not liable under this provision for discrimination that may be practiced by those with whom it *has a contractual relationship*, when that discrimination is not directed against its own clients or customers.

H.R. Rep. No. 101-485, pt. 2, at 101 (1990), *reprinted in* 1990 U.S.C.C.A.N. 384 (emphasis added). Thus, suppose that Mr. Martin plays a practice round of golf at a course several weeks before a PGA event. Under Title III, the owner of the golf course would be required to accommodate Martin's disability by letting him use a golf cart. In turn, the focus of this subsection would be relevant to the course owner's continuing obligations — or lack thereof — once the PGA, through its contract or arrangement with the owner, begins to operate the golf course for its event. The narrowing language in § 12182(b)(1)(A)(iv) would come into play. Nothing, however, in the legislative history suggests that Congress was otherwise intending to limit the entire scope of either Title III's general rule against discrimination by public accommodations or the specific prohibitions of § 12182(b)(2). The ADA is a remedial statute, and the PGA's attempt to cobble together a broad limitation from a circumscribed definition is unpersuasive.[8]

The PGA is also continuing to rely on its premise that a golf course is no longer a golf course during its competition events.[9] Instead, the PGA asserts that it is supplying

8. Moreover, even under the PGA's tortured reading of the statute, Mr. Martin is arguably a "customer" of the PGA's services, facilities, privileges, advantages, and accommodations in that he is a member of the public who was invited to qualify and participate in the PGA's golf course events.

9. Given that the golf courses are still being used as golf courses during PGA events, that argument is dubious. If an operator were to contract with a golf course owner to use the course for an outdoor concert or a private reunion, such an argument might be more compelling. The PGA also appears to suggest that Title III cannot extend to golf courses it operates because they are the players' "work areas." Interestingly, even Title III's implementing regulations contemplate accessibility in "work areas" in places of public accommodation. The regulation covering construction and alterations of places of public accommodation addresses "the usability of or access to an area of a facility that contains a primary function." 28 C.F.R. § 36.403(a) (1999). In turn, "[a]reas that contain a primary function include, but are not limited to, . . . offices

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entertainment through its "independent contractor" golfers. Thus, the PGA essentially concedes that it is covered by Title III as a "place of exhibition or entertainment." *Id.* § 12181(7)(C). Nonetheless, the PGA appears to be of the view that if it is operating a "place of exhibition or entertainment," then the playing areas or performing areas are altogether exempt from the scope of Title III. That is not the law.

Title III was not intended solely to increase access for persons with disabilities to *attend* places of public accommodation; it also addresses *participation* in public accommodations. In enacting the ADA, Congress found that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis . . . ." *Id.* § 12101(a)(9).[10] Title III identifies as discriminatory "a denial of the opportunity" for a person with a disability "to *participate in* or benefit from the . . . facilities, privileges, advantages, or accommodations" of the covered entity. *Id.* § 12182(b)(1)(A)(i) (emphasis added). During the legislative process, Congress took note of then-Attorney General Thornburgh's testimony "that we must bring Americans with disabilities into the mainstream

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and other work areas in which the activities of the public accommodation or other private entity using the facility are carried out." *Id.* § 36.403(b). The Justice Department has commented on the overlap with Title I:

> Some commentators asserted that questions relating to new construction and alterations of work areas should be addressed by the EEOC under Title I, as employment concerns. However, the legislative history of the statute clearly indicates that the new construction and alterations requirements of Title III were intended to ensure accessibility of new facilities to all individuals . . . .

28 C.F.R. pt. 36, App. B, § 36.401 (Dep't of Justice Interpretive Guidance).

10. This Court has embraced certain of these Congressional findings in prior decisions. *See Olmstead v. L.C.*, 527 U.S. 581, 588-89 (1999) (findings (a)(2), (3), & (5)); *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 801 (1999) (findings (a)(8) & (9)).

of society 'in other words, *full participation in* and access to all aspects of society.' " STAFF OF HOUSE COMM. ON EDUC. & LABOR, 101ST CONG., LEGIS. HISTORY OF P.L. 101-336, at 308 (Comm. Print 102-A) (from House Report) (emphasis added), *reprinted in* 1990 U.S.C.C.A.N. 267, 317. In the ADA Congress also responded to testimony that identified discrimination in "the failure to make reasonable modifications in policies to allow *participation*" by people with disabilities, and observed that "it can constitute a violation [of Title III] to impose criteria that limit the *participation* of people with disabilities." *Id.* at 309, 378 (emphasis added), *reprinted in* 1990 U.S.C.C.A.N. at 319, 388. *See also Menkowitz*, 154 F.3d at 122 (3d Cir. 1998) (holding that Title III covers a non-employee doctor with a disability in seeking staff privileges at a hospital).[11]

The PGA has insisted throughout this litigation that Title III applies only to the seating areas of sports arenas, but not to the areas "between the bleachers" or "inside the ropes." The District Court rejected this contention by observing that a disabled manager of a visiting professional baseball team would have to be accommodated in accessing the dugout. *Martin*, 984 F. Supp. at 1327. Other lower courts have had a similar view.

11. There is also nothing in the legislative history to suggest that Congress intended to exempt the sports world from the general application of Title III. Indeed, one of the original bill sponsors provided the following testimony:

> Society has neglected to challenge itself and its misconceptions about people with disabilities. When people don't see the disabled among our co-workers, or on the bus, or at the *sports field*, or in a movie theater, most Americans think it's because they can't. It's time to break this myth. The real reason people don't see the disabled among their co-workers, or on the bus, or at the *sports field*, or in a movie theater is because of barriers and discrimination. Nothing more.

STAFF OF HOUSE COMM. ON EDUC. & LABOR, 101ST CONG., LEGIS. HISTORY OF P.L. 101-336, at 943 (Comm. Print 102-B) (emphasis added) (statement of former House Majority Whip Tony Coehlo, who also revealed his own epilepsy).

For example, in *Anderson v. Little League Baseball, Inc.*, 794 F. Supp. 342, 345 (D. Ariz. 1992), the court made no distinction between the playing field and seating area in finding a policy limiting coaches in wheelchairs to the dugout — and not on the field in the coach's box — to violate Title III. *See also Olinger*, 55 F. Supp. 2d at 932, *aff'd*, 205 F.3d at 1004 ("ADA applies to the areas of competition . . . as well as to the gallery and the areas outside the ropes").

Other examples point out the fallacy of the PGA's attempt to exempt from the ADA all non-public portions of otherwise covered places of public accommodations. Private auditoriums, concert halls, convention centers, and lecture halls are all covered places of public accommodation. 42 U.S.C. §§ 12181(7)(C)-(D). Under the PGA's strained line of reasoning, only the areas of public seating in such facilities would be subject to Title III given that the general public is ordinarily not invited to be at the lectern or on stage for speeches or performances. But, suppose that a featured seminar speaker has a disability and is in a wheelchair,[12] or an accomplished violinist such as Itzhak Perlman must make use of crutches.[13] Or, consider a symphony that holds auditions open to the public or sponsors a music competition — may it bar access to performing areas for the *next* Itzhak Perlman? Clearly, Title III requires the facilities to make the speaking areas or performing areas accessible. Indeed, the implementing regulations require access to "performing areas" in assembly facilities. *See* 28 C.F.R. pt. 36, App. A, §§ 4.33.5 & 4.1.3(5)(Exc. 4)(a) (1999). Section 4.33.5 provides plainly that "[a]n accessible route shall connect wheelchair seating locations with performing areas, including stages, arena

12. For example, Texas Supreme Court Justice Greg Abbott must use a wheelchair for his disability; he is a frequent speaker throughout Texas.

13. Mr. Perlman contracted polio as a child, and his legs became paralyzed. He performs while seated. "Perlman actively promotes laws to ease the access of disabled persons to buildings and transportation." WORLD BOOK, *Itzhak Perlman*, *available at* <http:/www.worldbook.com/fun/wbla/israel50/html/ldrperl.htm>.

floors, dressing rooms, locker rooms, and other spaces used by performers." This regulation mirrors identical language that has long been part of the implementing regulations for the Rehabilitation Act. *See* 36 C.F.R. § 1190.31(s)(3) (1999). Given Congress' intent that the standards applicable under the Rehabilitation Act be carried forward into the ADA (42 U.S.C. § 12201(a)), it is evident that Congress did not intend to exclude performing or playing areas from its detailed list of covered places of public accommodations. *See also Bragdon v. Abbott*, 524 U.S. 624, 632 (1999) (this Court is required "to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act").

This Court has deferred to the Justice Department's views on Title III issues and given weight to that agency's "administrative guidance" through implementing regulations, technical assistance, and statutory authority "to enforce Title III in court." *Id.* at 646. With regard to performing areas, the Justice Department's Civil Rights Division (Disability Rights Section) has issued a policy statement regarding ADA requirements for the construction of sports stadiums. That guide not only addresses accessible seating, but also requires accessible routes that "connect the wheelchair seating locations with the stage(s), performing areas, arena or stadium floor, dressing or locker rooms, and other spaces used by performers." U.S. Dep't of Justice, *Accessible Stadiums*, at 2, *available at* <http://www.usdoj.gov/crt/ada/stadium.pdf>. The policy statement specifically addresses access to playing fields, lockers, and spaces used by players and performers. *Id.* at 3.[14] Indeed, the policy requires an accessible route for "the playing fields, locker rooms, dugouts, stages, swimming pools, and warm-up areas" to "provide[ ] access for the *public, employees, and*

14. In 1996 the Justice Department communicated these guidelines to Major League Baseball with respect to stadium construction for both major league and minor league stadiums. Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Allan L. Selig, Acting Commissioner of Baseball (Oct. 22, 1996), *available at* <http://www.usdoj.gov/crt/foia/cltr196.txt>.

athletes using the facility." *Id.* (emphasis added). In this regard, the United States reached a settlement with the Atlanta Committee for the Olympic Games regarding an ADA dispute concerning construction of the Olympic Stadium. In addition to provisions regarding seating areas, the agreement addressed accessibility for the dugouts, locker rooms, dressing rooms, and accessible routes to each dugout from the playing field. *See* Settlement Agreement Concerning the Olympic Stadium, *available at* <http://www.usdoj.gov/crt/ada/stadiumo.htm> (May 15, 1996).[15]

The PGA appears to believe that persons with disabilities can have no place in so-called "elite" sports events. However, other professional sports leagues have had a more accommodating attitude. For example, Jim Abbott, who was born without a right hand, was able to pitch for many years for the New York Yankees and Anaheim Angels. Indeed, Mr. Abbott has indicated that the American League adjusted its rules for him:

> It allowed me to spin the ball even though the strictest interpretation of the rules state that a pitcher must remain completely still before his delivery. But

15. Similarly, the Recreation Access Advisory Committee of the U.S. Architectural and Transportation Barriers Compliance Board has issued advisory guidelines for sports facilities that include recommendations for access to such places as dugouts and the field-of-play. *See* Recreation Advisory Committee, *Recommendations for Accessibility Guidelines: Recreational Facilities and Outdoor Developed Areas*, at 3, 6 (July 1994) (developed for U.S. Arch. and Transp. Barriers Compliance Board). The Committee's advisory guidelines for new golf course construction "have as an underlying premise that the game of golf played by persons with disabilities *will be via the use of a golf car or similar means of mobility*." *See id.* at 106 (emphasis added) (also declaring that "it is *unrealistic to believe* that persons with severe mobility impairments will be able to play a round of golf via manual ambulation"). *See also Sutton v. United Airlines*, 527 U.S. 471, 479 (1999) (42 U.S.C. § 12204 grants "authority to the Architectural and Transportation Barriers Compliance Board to issue minimum guidelines to supplement the existing Minimum Guidelines and Requirements for Accessible Design").

> since I couldn't keep the ball in my glove — I had to switch the glove to my left hand immediately after I finished my release to the plate — baseball made an exception.

Jim Abbott, *It's Easy to Accommodate*, GOLF WORLD, Feb. 20, 1998, at 92. Similarly, Kenny Walker, who is deaf, enjoyed success with the Denver Broncos in the National Football League "often while using a sign language interpreter on the sidelines." Ted Curtis, *"Cart" Blanche*, ABA JOURNAL, April 1998, at 34. Tom Dempsey, a former kicker for the New Orleans Saints who still shares the record for the longest field goal in the National Football League, was allowed to wear a special shoe to accommodate his disabled foot.[16] Additionally, the National Basketball Association welcomed Magic Johnson back to the sport after he revealed his HIV status. Although Title I would address the employer teams' responsibilities to such players, opposing teams' stadiums and facilities must be accessible per Title III.

Indeed, Title III's general rule is broad and sweeping. At the collegiate level, some courts have recognized Title III's applicability to the governing body, the NCAA, as an operator of places of public accommodations. *See Tatum v. NCAA*, 992 F. Supp. 1114, 1121 (E.D. Mo. 1998); *Ganden v. NCAA*, 1996 WL 680000, at *9-11 (N.D. Ill. 1996); *Bowers v. NCAA*, 9 F. Supp. 2d 460, 485-90 (D.N.J. 1998) (denying NCAA motion for summary judgment). The NCAA, of course, operates "elite" national championships, including men's and women's golf championships. Indeed, the NCAA permitted Martin the use of a golf cart in its events that determined the collegiate national champions.[17]

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16. *See* Murray Chass, *Pro Football: 63-Yard Field Goal*, N.Y. TIMES, Nov. 9, 1970, *reprinted in* 1 N.Y. TIMES ENCYCLOPEDIA OF SPORTS 149-50 (Gene Brown ed. 1979) (describing record kick and special kicking shoe allowed for Dempsey, who "was born with half a right foot").

17. The 1999 NCAA Men's Golf Championship was held at Hazeltine National Golf Club in Chaska, Minnesota. That same course (Cont'd)

Many other people participate "inside the ropes" of sporting events in addition to the players. For example, in professional football it is not unusual, and even expected, for one to see coaches, managers, referees, trainers, and even team owners in the area not open to the general public. And, this list does not begin to include the array of band members, cheerleaders, photographers, and members of the press who are a regular part of every game. Given the PGA's analysis, Title III would not be applicable to any such persons with disabilities.[18] Alternatively, if the PGA's strained attempt to convert this case into an employment scenario were accepted, others "inside the ropes" such as caddies, volunteers, marshals, and even amateur competitors invited to participate perhaps would be protected, but not Martin or other competitors. Congress did not intend to create such a patchwork of discrimination protection. And, at its most basic level, this case is about *discrimination*. The PGA has chosen to discriminate against Casey Martin because of his disability. If the PGA's approach to Title III is sustained, the PGA *could* adopt rules to preclude persons with visual disabilities from playing the game; it *could* exclude golfers with

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hosted the United States Open (conducted by *Amicus Curiae* USGA) in both 1991 and 1970. Surely the *same* golf course cannot be fully covered by Title III when operated by the NCAA for its collegiate national championship, yet not covered when operated by the USGA for its national championship.

18. *Cf.* Sue Anne Pressley, *A "Safety Blitz; Texas Cheerleader Loses Status After Others' Parents Complain*, WASHINGTON POST, Nov. 12, 1996, at A1 (discussing issues regarding removal from cheerleading squad of a Texas high school cheerleader born with cerebral palsy who uses a wheelchair). Also, at the District Court, counsel for the PGA "categorically" asserted that a "handicapped caddie would not have to be accommodated" because the tournament playing area "is not a place of public accommodation where the handicapped caddie is. It is not an area that is open to the general public." Resp. Br. in Opp. Appendix A at 3a.

epilepsy; it *could* bar deaf golfers.[19] Title III, however, applies to the PGA as it operates its golf tournaments on golf courses, and discrimination because of disability is unwarranted and unlawful.

II. THE LOWER COURTS CORRECTLY FOUND THAT PERMITTING CASEY MARTIN TO USE A GOLF CART IN PGA EVENTS IS A REASONABLE MODIFICATION THAT DOES NOT FUNDAMENTALLY ALTER THE GAME OF GOLF OR PGA COMPETITIONS.

Title III prohibits the "failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford . . . services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such . . . services, facilities, privileges, advantages, or accommodations." 42 U.S.C. § 12182(b)(2)(A)(ii). On its face, this statute plainly places the burden of demonstrating fundamental alteration on the public accommodation, here the PGA. With respect to allocating the burdens of proof, the courts below relied on *Johnson v. Gambrinus Co./Spoetzel Brewery*, 116 F.3d 1052, 1059 (5th Cir. 1997) (holding that a brewery's refusal to allow a blind individual to take his guide dog on a tour of the brewery violated Title III despite the brewery's blanket "no animals" policy). Under *Johnson*, the Title III plaintiff, once having

19. For example, the PGA could assert that such a rule would be "substantive" in that a deaf golfer would have an advantage in not being distracted by crowd noise. University of Louisville Law School Dean Laura Rothstein, the author of a treatise and a casebook on the ADA, has queried "whether the PGA would be likely to claim that it is not a public accommodation if Tiger Woods was not allowed to play and brought a race discrimination case." Laura F. Rothstein, TEACHER'S MANUAL, DISABILITY LAW: CASES, MATERIALS, PROBLEMS, at 49 (2d ed. 1998). She adds that "[w]hile the term 'public accommodation' is defined differently in different contexts, surely the intent of applicability of civil rights statutes is the same." *Id.*

established a disability, must prove that "a modification was requested and that the requested modification is . . . reasonable in the general sense, that is, reasonable in the run of cases." *Id.* Upon such a showing, then "the defendant must make the requested modification unless the defendant pleads and meets its burden of proving that the requested modification would fundamentally alter the nature of the public accommodation." *Id.* Moreover, *Johnson* stresses that the defendant's burden regarding an alleged fundamental alteration must "focus[ ] on the *specifics of the plaintiff's or defendant's circumstances* and not on the general nature of the accommodation." *Id.* at 1060 (emphasis added). In applying this analysis, the District Court found and the Ninth Circuit affirmed that providing Martin a cart did not fundamentally alter PGA golf events.

What did Congress intend with respect to the "fundamental alteration" exception? The PGA is correct that Title III's "fundamental alteration" exception derived from this Court's opinion in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (construing Section 504 of the Rehabilitation Act). It is useful, therefore, to contrast the facts in *Davis* to those now before the Court. In *Davis*, a nursing student had a serious hearing disability. The Court determined that the college would have to make substantial curricular changes to its program to accommodate her. As the Court stated:

> In light of respondent's inability to function in clinical courses without close supervision, Southeastern . . . could allow her to take only academic classes. Whatever benefits respondent might realize from such a course of study, she would not receive even a rough equivalent of the training a nursing program normally gives. Such a fundamental alteration in the nature of a program is far more than the 'modification' the regulation requires.

Id. at 409-10. The Court was concerned about requirements for "substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified

individuals." *Id.* at 410. The "substantial adjustments" at stake in *Davis* related to a critical part of nursing training — the clinical instruction component. Moreover, the clinical training related to patient safety.[20] In contrast, in this case the modification sought by Martin is a form of transport to and from his shots in professional golf. No safety issues are at stake in any way, and the differences in impact between the facts here and those of *Davis* are striking. Also, and importantly, in *Davis* the Court recognized that "[t]echnological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them . . . ." *Id.* at 412.

Although the PGA has conceded that Mr. Martin's K-T Syndrome is a disability covered by the ADA, it has never made an individualized inquiry about his specific condition or need for the requested modification. There is ample support for the requirement that an individualized assessment *must* be undertaken. *See School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 287 (1987) (calling for individualized inquiries with appropriate findings of fact in Rehabilitation Act cases; viewing same as "essential").[21] The legislative history is also

20. The Court noted, "In effect, it [Southeastern] seeks to ensure that no graduate will pose a danger to the public in any professional role in which he or she might be cast." *Id.* at 413 n.12.

21. *See Washington v. Indiana High School Athletic* Ass'n, 181 F.3d 840, 851 (7th Cir.), *cert. denied*, 120 S. Ct. 579 (1999) (following *Arline* to require an individualized approach; also, construing *Arline* to require "that some exceptions ought to be made to general requirements to allow opportunities" for persons with disabilities, and "to focus on the general purposes behind a rule without considering the effect [of] an exception for a disabled individual . . . would negate the reason for requiring reasonable exceptions"); *Crowder v. Kitagawa*, 81 F.3d 1480, 1486 (9th Cir. 1995) ("the determination of what constitutes reasonable modification is highly fact specific, requiring case-by-case inquiry"); *Anderson*, 794 F. Supp. at 345 (invalidating application of Little League's blanket rule banning coaches in wheelchairs from the coach's box where no individualized assessment was conducted); *cf. Sutton*, 527 U.S. at

(Cont'd)

instructive on this point. During the legislative process, Congress observed that "public accommodations are required to make decisions *based on facts applicable to individuals* and not on the basis of presumptions as to what a class of individuals with disabilities can or cannot do." STAFF OF HOUSE COMM. ON EDUC. & LABOR, 101ST CONG., LEGIS. HISTORY OF P.L. 101-336, at 375 (Comm. Print 102-A) (from House Report) (emphasis added), *reprinted in* 1990 U.S.C.C.A.N. at 385. That view is emphasized repeatedly in the Congressional findings set forth in the ADA. 42 U.S.C. § 12101(a).[22] In subsequent application, the Justice Department and NCAA entered into a consent decree in the U.S. District Court for the District of Columbia in which the NCAA agreed to conduct *individualized* waiver determinations for students with learning disabilities who do not meet NCAA initial-eligibility standards. *See* NCAA Consent Decree, *available at* <http://www.usdoj.gov/crt/ada/ncaa.htm> (May 26, 1998).

The PGA has not met its statutory burden of demonstrating that allowing Mr. Martin to use a cart as an accommodation for his disability fundamentally alters the game of golf as it is played in PGA events. The game is defined as "playing a ball from the teeing ground into the hole by a stroke or successive strokes in accordance with the Rules." Rules of Golf, Rule 1-1, *available at* <http://www.usga.org/rules/rule_2000/index.html>. Nothing in the rules of the game requires walking. The "walking rule" was added by the PGA, but not even for all its events. As found by the District Court, there are exceptions for the Senior PGA

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483 ("whether a person has a disability under the ADA is an individualized inquiry"); *Bragdon*, 524 U.S. at 657 (Rehnquist, Ch. J., concurring in judgment and dissenting in part) ("individualized inquiry");

22. For example, Congress found that "forms of discrimination against *individuals* with disabilities continue to be a serious and pervasive social problem"; "discrimination against *individuals* with disabilities persists in such critical areas as . . . public accommodations"; and that "*individuals* with disabilities continually encounter various forms of discrimination, including . . . failure to make modifications to existing facilities and practices." *Id.* §§ (a)(2), (3), & (5).

Tour (golfers over 50) as well as the first two stages of the PGA's Qualifying School Tournament. *Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242, 1248 n.9 (D. Or. 1998). The PGA imposes no penalty strokes on those who opt to use carts in such events. *Id.* at 1248. As best-selling sports author John Feinstein has written, "If being fifty [i]s enough of a handicap to be allowed a cart, then a disease like this one [i]s surely worthy of an exception to the no-cart rule." JOHN FEINSTEIN, THE MAJORS 221 (1999).[23]

The game of golf is about shot-making. Golf, even PGA-level competition, is not a contest in which speed, mobility, size, or quickness is essential (in contrast to sports like tennis, soccer, basketball, football, and running). The lowest score wins in PGA events. There is no bonus reduction of strokes for fast play; no style points for speed or walking form; no requirement to run between shots; and no penalty for moving up the fairway too slowly (although time limits apply once a ball is reached and before it is struck). The game is about skilled shot-making, not walking. What, then, is the fundamental alteration in allowing Martin a cart? One commentator has turned to a dictionary for guidance and observed,

> "[F]undamental" means "serving as, or being an essential part of, a foundation or basis." "Essential" means either "absolutely necessary; indispensable,"

23. Hence, cart use is not unknown in PGA events. Indeed, golfers who advance to the third stage of the Qualifying School become eligible for competing in either PGA Tour or Buy.com Tour (formerly Nike Tour) events, depending on their performance in that final stage. Thus, members of the golfing public who used carts in the early rounds of Qualifying School have become eligible to play in PGA events. Also, the PGA routinely lets players ride carts in certain situations "to save time." *Martin*, 204 F.3d at 1000. A player also can earn the right to play in a single PGA tournament by playing well in that week's qualifying event, where carts are permitted. In addition, and apparently without any impairment to the integrity of the competition, both the NCAA and the PAC 10 athletic conference allowed carts to accommodate Martin in college championships. *Martin*, 994 F. Supp. at 1248.

> or "a basic or necessary element." Walking a golf course is not a basic element necessary to the essential nature of professional golf.

Todd A. Hentges, *Driving in the Fairway Incurs No Penalty: Martin v. PGA Tour, Inc. & Discriminatory Boundaries in the Americans with Disabilities Act*, 18 LAW & INEQ. J. 131, 175 (Winter 2000) (footnotes omitted). The PGA has attempted to evade Title III by asserting that its walking rule is substantive, and therefore exempt. This argument ignores the statutory obligation to make reasonable modifications absent a fundamental alteration. Surely, Congress intended that a public accommodation's burden of "demonstrating" a fundamental alteration be more than merely labeling a matter as substantive.[24]

Casey Martin is extremely skilled at golf shot-making; he has proven that he can meet the general qualifications of the PGA; he just has a disability that limits his ability to walk. A simple accommodation of the use of a cart allows him to play the sport at the highest level, and does not alter the nature of the competition. There are many golfers who are *excellent* walkers, but who can only dream of playing golf with the skills of Jack Nicklaus, Tiger Woods, or Casey Martin. Unlike the PGA's stars, these fine walkers, but mediocre golfers, lack the shot-making skills that are the fundamental aspects of the game. In the words of one commentator:

> Of course Martin should get a cart. . . . Golf fans want to see golfers play golf. I've never heard

24. One wonders whether the PGA is more concerned with appearances. John Feinstein, although not a supporter of cart use, has observed, "The Tour didn't mind the idea of the over-fifty set tooling around in carts, but the idea of seeing players on the regular tour lurching down the fairways in carts was a disturbing one." JOHN FEINSTEIN, THE MAJORS 221 (1999). Feinstein also quoted Davis Love, a member of the PGA's Tour Policy Board, as follows: "Kind of sucks the drama out of the walk up eighteen if the guys come *riding* up, doesn't it? . . . We're going to lose in court, but we still have to fight the idea that riding is okay." *Id.* (emphasis in original). Love also reflected that cart use might "be okay for Casey because his case is unique, but it shouldn't be okay for anyone else." *Id.*

> anybody yet say, "Hey, let's go over to [hole] 9 and watch Seve walk! Fans don't care if a pro walks, rides or pogo-sticks to the next shot — they just want to see him hit it. . . . Martin isn't asking for any help playing the game. He's only asking for a lift to his ball. Golf isn't an obstacle course.

Rick Reilly, *Give Casey Martin a Lift*, SPORTS ILLUS., Feb. 9, 1998, at 140.

As the PGA observes, the District Court found that the PGA's walking rule has a "cognizable purpose" of injecting "the element of fatigue into the skill of shot-making." *Martin*, 994 F. Supp. at 1250. The PGA continues to decline to discuss, however, that after a six-day bench trial, the District Court found further that the fatigue factor involved in walking the golf course during PGA events "cannot be deemed significant under normal circumstances." *Id.* Also, from the outset, the PGA has glossed over and altogether ignored the District Court's findings regarding the *individual* aspects of Mr. Martin's disability: he endures substantial *additional* fatigue and significant pain associated with his disability *even when accommodated* with a cart. *See id.* at 1251-52 ("fatigue plaintiff endures just from coping with his disability is undeniably greater" than ordinary walking of the course; "plaintiff is in significant pain when he walks and even when he is getting in and out of the cart"). As emphasized by the Court of Appeals, "Even with a cart, Martin must walk about twenty-five percent of the course because the cart cannot be brought near to the ball in many cases." *Martin*, 204 F.3d at 1000. Given Martin's substantial fatigue and pain caused by his disability, he might have asked to be allowed to play only 9 of the requisite 18 holes, then multiply his score by 2. But, *that* would be a fundamental alteration of the sport — his score would not be based on shot-making over the full course. Instead, he has merely asked for the use of a cart to transport him between shots. Of course, the PGA never attempted to make an individualized inquiry; it refused to even consider his

individual disabling condition.[25] Instead, it posits that the walking rule is intended to make professional golf a contest of "physical performance." If that were truly the case, one would think that players would be directed to carry their own clubs, replace their own divots, rake sandtraps, and run between shots.

The PGA has also argued that cart-use will give Mr. Martin an advantage over other golfers. In making this assertion, the PGA apparently presumes that an able-bodied golfer, if permitted to use a cart, would have an advantage over other able-bodied golfers during a PGA tournament.[26] Even if a cart were to provide an advantage to another able-bodied golfer, the proper focus should be on whether the accommodation is a reasonable modification for the affected *individual* with the disability. The point of the ADA is to level the playing field for otherwise qualified individuals with disabilities. *Cf. Schmidt v. Methodist Hospital*, 89 F.3d 342, 344 (7th Cir. 1996) ("ADA is designed to level the playing field for . . . [individuals] who have one or more physical or mental disabilities"). A cart does not provide Casey Martin an advantage; it levels the playing field with able-bodied golfers by giving him the opportunity to compete.[27]

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25. A video of Martin's condition was introduced at trial. The District Court found it to provide "compelling evidence of the nature and extent of his disability." *Martin*, 994 F. Supp. at 1243. The District Court found this tape not only relevant, but "critical" to "[c]onsideration of the nature and extent of plaintiff's disability . . . [in] determining whether use of a cart affords him a reasonable accommodation under the circumstances presented." *Id.* at 1243 n.1.

26. Even this surmise is without foundation. Once the District Court ordered the PGA to permit Martin to use a cart during the 1997 Qualifying Tournament, the PGA allowed carts for all 168 competitors; however, only a handful chose to do so. If there had been an advantage, surely many more of the golfers would have seized the opportunity.

27. By way of analogy to the education field, a common accommodation for a student with a learning disability is to provide additional time for examinations. *See* Laura F. Rothstein, *Higher Education and Disabilities: Trends and Developments*, 27 STETSON

(Cont'd)

The PGA also complains that to require it to adhere to Title III and make individualized inquiries would be burdensome. In this regard it also expresses concerns about players with bad backs and sore knees. The PGA overstates the potential burden. First, Title III has no application to a person who lacks a covered disability. Also, the number of golfers who will be able to overcome disabilities to achieve PGA-caliber performances may well be small. After all, such persons with disabilities must still demonstrate that they are "otherwise qualified." Finally, given that entities such as private colleges, medical, nursing, and law schools, and medical, nursing, and legal examining boards (per Title II), make such individualized inquiries every day in matters that arguably have far more societal impact than pro golf, the PGA's complaint rings hollow.

The PGA and its *Amici* have advanced "slippery slope" arguments that allowing a golf cart for Mr. Martin would result in changes to all pro sports. Such hypotheticals are largely misplaced. Many changes, such as moving basketball's three-point line or giving a swimmer a head start, would truly alter the actual competition. Indeed, some accommodations in golf might fundamentally alter the competition. For example, some persons with K-T Syndrome have the condition in their arm(s) or trunk. Their disability might keep them from being able to hit the ball very far, or even preclude their ability to swing the

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L. REV. 119, 123 n.19 (1997); *cf. McGregor v. Louisiana State Univ. Bd. of Supervisors*, 3 F.3d 850, 856-58 (5th Cir. 1993), *cert. denied*, 510 U.S. 1131 (1994) (finding accommodations such as extra examination time to be adequate, but rejecting additional requests for a part-time schedule and home-based exams). Thus, if a college accommodates a student with dyslexia by providing time and one-half for exams, that would be a typical accommodation to level the playing field for that student. Although the granting of extra time to a non-disabled student could well be an advantage, the same cannot be said with regard to the otherwise qualified student with dyslexia. Just like the cart for Mr. Martin, the extra time for the hypothetical student's reading disability simply offers an opportunity to compete.

golf club at all. For them, accommodation requests to tee the ball closer to the hole, to use a special golf ball, or to throw or roll the ball instead of stroking it with a club could constitute fundamental alterations of the PGA's competitions. As one commentator has observed, the "so-called slippery slope argument is tempting to trot out anytime a result like . . . Martin . . . is reached. . . . What this argument conveniently ignores is that much of the business of law is drawing lines. Judges are paid to do so, and they generally do it well." Tom D'Agostino, *Casey Martin Golf Cart Case About Fairness; ADA Not Con Artist's Tool*, ARIZONA REPUBLIC, March 9, 1998, at B5. Given that the PGA failed in its burden of demonstrating fundamental alteration as to *this* individual with a disability, the Court can resolve this case without needing to explore the full extent of Title III's reach.

The PGA has not demonstrated that allowing Mr. Martin to use a golf cart to accommodate *his* disability causes any fundamental alteration of its events. Professional golf is neither a speed sport, nor an endurance sport. The method by which the players get to the ball is largely irrelevant. Winning is based on the total number of strokes, not the method of moving about the course. The lower courts should be affirmed.

CONCLUSION

As Congress recognized in enacting the ADA, "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous . . . ." 42 U.S.C. § 12101(a)(9). In our society, the opportunity to *compete* in life is often reflected in the sports world. Americans love an underdog, an individual who can overcome adversity and strive to succeed against the odds. Members of the K-T Support Group and their children and loved ones afflicted with this rare and disabling condition have been inspired by Mr. Martin. They believe that if Casey is unwilling to give up in his quest for the "opportunity to compete on an equal basis" despite his condition, they can pursue dreams too — in any of life's many paths.

The overarching purpose of the ADA is to grant persons with disabilities the opportunity to participate fully in life, and not to be forced to the back rows or excluded entirely. Most PGA golfers started out as ordinary people who developed their shot-making skills to an extraordinary level. Mr. Martin also has developed his golf skills to an exceptional level; however, he simply cannot walk the whole golf course *because of a disability*. He should not be forced to the sidelines. Title III allows Mr. Martin the opportunity to compete on an equal basis with other PGA golfers – particularly given that the simple accommodation of providing *him* a cart does not fundamentally alter the sport.

The ADA is all about inclusion and opportunity. As stated by Jim Abbott, the Major League pitcher who competed and succeeded although he lacked a right hand, "As a society, we are so much better off with people like Casey Martin, who show us that heart is just as important as talent, who only want an opportunity to compete against the best in their profession. That is what this case is about." Jim Abbott, *It's Easy to Accommodate*, GOLF WORLD, Feb. 20, 1998, at 92.

The judgment of the Court of Appeals in this matter should be affirmed.

Respectfully submitted,

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The Honorable Robert J. Dole, Tom Harkin, Steny H. Hoyer, James M. Jeffords and Edward M. Kennedy respectfully submit this brief *amici curiae*. Letters of consent from both parties have been filed with the Clerk of this Court[1]. The brief urges affirmation of the decision below and thus supports the position of the respondent Casey Martin before this Court.

[1] Pursuant to this Court's Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amici* or counsel to *amici* contributed money or services to the preparation and submission of this brief.

INTEREST OF THE *AMICI CURIAE*

Each of the *amici* played leadership roles in the U. S. Congress in the development and passage of the Americans with Disabilities Act (ADA). 42 U.S.C. §§ 12101-12213. The interest of the *amici* is to provide the Court with information regarding the concerns addressed by Congress through passage of the ADA.

Amici, current and former Members of Congress, spent years examining the problems of discrimination based on disability and carefully crafted statutory language to remedy such discrimination. *Amici* have an interest in preventing the discrimination that this legislation makes unlawful. This is especially true when the precise language of the statute clearly requires modification of the petitioner's rule prohibiting the use of golf carts to allow access by the respondent, a modification that petitioner seeks to avoid.

Amici have first-hand knowledge of the legislative history that exists in the public record and seek to bring to the attention of the Court parts of the public record that were developed contemporaneously with the passage of the ADA that demonstrate Congressional intent in support of the plain meaning of the statute.

Petitioner's characterization of the ADA is without support in the text of the statute and would subvert Congressional intent that the ADA comprehensively prohibit discrimination on the basis of disability. Petitioner would leave public accommodations with largely unfettered discretion to engage in such discrimination. Petitioner's mischaracterization of the ADA obscures two of the statute's key characteristics – the breadth of its scope and the strength of its nondiscrimination standards.

SUMMARY OF ARGUMENT

The express language of the ADA, as well as its policy framework and legislative history, unequivocally support the decision of the Ninth Circuit that Title III applies to golfers competing in petitioner's tour events and that the modification requested by respondent, use of a golf cart, would not fundamentally alter these events.

The ADA established a "comprehensive national mandate" for "clear, strong, consistent, enforceable standards" for the elimination of discrimination on the basis of disability. 42 U.S.C. §§12101(a)(2), (a)(3), (b)(1), and (b)(2). Congress intended this statute to be read expansively, not narrowly, to afford the greatest possible protections to persons with disabilities.

As leading architects of the ADA, *amici* know well that Congress intentionally predicated the law on the foundation established by prior civil rights laws, especially the Civil Rights Act of 1964. In particular, Congress drafted Title III of the ADA to encompass, and expand upon, the provisions of Title II of the Civil Rights Act of 1964 that defined the scope of the law's applicability to public accommodations. Because participants in athletic contests are covered by Title II of the Civil Rights Act of 1964, Congress clearly intended that they be embraced by Title III of the ADA. Furthermore, by its own terms and legislative history, the ADA fully applies to professional athletes competing in sporting events.

Petitioner's efforts to carve out exceptions or limitations to the broad scope of Title III, *e.g.*, for participants in professional sports, are ill conceived. Exceptions to Title III were specifically and carefully crafted by Congress and there is no support in the statute or its

legislative history for the argument that additional exceptions narrowing the intended breadth of Title III may be read into the law

The ADA requires a public accommodation to make "reasonable modifications" to policies and practices to afford an individual with a disability an opportunity to obtain the goods, services, facilities, privileges, or accommodations that it offers. However, a public accommodation need not make the modifications if it "can demonstrate" that it "would fundamentally alter the nature of such goods, services, facilities, privileges, or accommodations." 42 U.S.C.§ 12182(b)(2)(A)(ii). The reasonable modification requirement is a critical element of the non-discrimination mandate of the ADA. For this reason, the "fundamental alteration" standard is stringent, requiring the public accommodation to demonstrate that the modification would alter the essential nature of the goods or services being offered. The Ninth Circuit correctly found that the petitioner failed to carry this burden with respect to respondent's use of a golf cart in tour events.

Petitioner's contentions that it should be excepted from the reasonable modification obligation because it conducts high-level sports competitions, the uniformity of its rules should be inviolate, and individualized modifications would be burdensome, have no basis in the statutory language or legislative history of the ADA.

For the foregoing reasons, the decision of the Ninth Circuit should be affirmed.

ARGUMENT

I. TITLE III OF THE AMERICANS WITH DISABILITIES ACT PROHIBITS DISCRIMINATION ON THE BASIS OF DISABILITY AGAINST ATHLETES AND OTHER PERFORMERS AT PLACES OF PUBLIC ACCOMMODATION.

A. In Enacting the ADA, Congress Intended to Eliminate Discrimination from Public Accommodations and Other Aspects of American Society.

1. The Broad Overall Congressional Goal.

In enacting the ADA, Congress addressed "a serious and pervasive social problem," 42 U.S.C. §12101(a)(2) – *viz.* discrimination on the basis of disability. Congress acted in a systematic fashion, considering legislation during the 100th and 101st Congresses. During this period, Congress identified some of the devastating results of discrimination based on disability, including relegation of people with disabilities to "an inferior status in our society" in which they are "severely disadvantaged socially, vocationally, economically, and educationally," and "denie[d] the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous." *See id.* § 12101(a)(6) and (9). Congressional investigation disclosed a drastic under-utilization of public accommodations by people with disabilities. *See* S. Rep. No. 101-116, at 10-11 (1989); H.R. Rep. No. 101-485, pt. 2, at 34-35 (1990).

As a result of this lengthy investigation, Congress concluded that discrimination existed in a variety of "critical areas" of life including "public accommodations," and that "people with disabilities continually encounter various forms of discrimination." 42 U.S.C. § 12101(a)(3) and (5). This conclusion was specifically supported by voluminous documentation, including seven extensive reports expressly referenced in Congressional committee reports.[2] These

[2] S. Rep. No. 101-116, at 6 (1989); H.R. Rep. No. 101-485, pt. 2, at 28 (1990). The seven reports are as follows: TOWARD INDEPENDENCE (1986)

reports included descriptions of some of the precise forms of discrimination Congress sought to remedy. For example, the U.S. Commission on Civil Rights' report entitled, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES (1983), included "[d]enial of access to professional and semipro teams" in an Appendix of "issue areas in which problems of discrimination occur." *Id.* at 165, 168. This report demonstrates that Congress intended the ADA to cover professional sports activities, including the professional atheletes.

To address such a drastic and widespread problem, *amici* and other Members of Congress did not resort to half measures in enacting the ADA. Congress was abundantly clear that the purpose of the ADA is to provide a "comprehensive national mandate for the elimination of discrimination," that would establish "clear, strong, consistent, enforceable standards ...." 42 U.S.C. § 12101(b)(1) and (2). In captioning the ADA as "[a]n Act to establish a clear and comprehensive prohibition of discrimination on the basis of disability" (Pub. L. No. 101-336, 104 Stat. 327(1990)), Congress indicated clearly that it was not seeking to address discrimination based on disability in a partial or piecemeal fashion.

The "broad," "comprehensive," and "omnibus" nature of the ADA was stressed throughout its legislative history.[3] In

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and ON THE THRESHOLD OF INDEPENDENCE (1988) by the National Council on Disability; U.S. Commission on Civil Rights report ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES (1983); Louis Harris and Associates, THE ICD SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM, (1986) and THE ICD SURVEY II: EMPLOYING DISABLED AMERICANS (1987); REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC (1988); and REPORT OF THE TASK FORCE ON THE RIGHTS AND EMPOWERMENT OF AMERICANS WITH DISABILITIES (1990).

[3] *See, e.g.*, S. Rep. No. 101-116, at 18-19 (1989) ("omnibus civil rights legislation"; "comprehensive civil rights legislation for people with disabilities"); H.R. Rep. No. 101-485, pt. 2, at 48 (1990) ("omnibus civil rights legislation"; "comprehensive civil rights legislation for people with disabilities"); H.R. Rep. No. 101-485, pt. 3, at 26 (1990) ("a comprehensive piece of civil rights legislation"); H.R. Rep. No. 101-485, pt. 4, at 24 (1990) ("broad-based protection against discrimination"); 135 CONG. REC. S 4984 - S 4985 (daily ed. May 9, 1989) (ADA introductory statement of Sen. Harkin) ("a broad and remedial bill of rights for people with disabilities"; "omnibus civil rights statute"; Presidential Commission on HIV recommendation of "comprehensive Federal antidiscrimination legislation"); 136 CONG. REC. H 2438 (daily ed. May 17, 1990) (statement of Rep. Edwards) ("comprehensive antidiscrimination protections"); 136 CONG. REC. H 2444 (daily ed. May 17, 1990) (statement of Rep. Matsui) ("it is a comprehensive package"); 136 CONG. REC. S 9695 (daily ed. July 13, 1990) (statement of Sen. Dole) ("the most comprehensive civil rights legislation our Nation has ever seen").

announcing the Bush Administration's support for the ADA, then-Attorney General Thornburgh testified during Congressional hearings that "[o]ne of its most impressive strengths is its comprehensive character." *Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources, Subcomm. on the Handicapped*, 101st Cong. at 192-197 (1989). He also decried "piecemeal" and "patchwork quilt legislative approaches...." *Id.*

2. *The Statutory Language of Title III.*

Congress formulated the nondiscrimination mandates of Title III in extremely broad terms. The general prohibition of discrimination declares: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a).

This language is expansive in several ways. It guarantees any individual who is discriminated against on the

basis of disability, "full and equal enjoyment" of public accommodations. It applies inclusively to "the goods, services, facilities, privileges, advantages, or accommodations" provided by a public accommodation. As to who is prohibited from discriminating, the language encompasses not just the owner of a place of public accommodation but "any person who owns, leases (or leases to), or operates" such a place. *Amici* and other members of the 101st Congress articulated a broad nondiscrimination requirement intended to achieve the goal of affording access to persons with disabilities to all aspects of society.

The approach of the ADA in Title III tracks that of Title II of the Civil Rights Act of 1964 by regulating "public accommodations" whose operations "affect commerce," and using the same definition of "commerce."[4] Title III of the ADA owes its conceptual origins, much of its terminology and its remedies[5] to Title II of the Civil Rights Act of 1964. Congress, in crafting the ADA, chose to expand upon the types of entities defined as public accommodations.

The Title III definition of public accommodation is formulated as a list of twelve broad categories of establishments, including golf courses.[6] The twelve categories

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[4] 42 U.S.C. § 12181(7) (Title III incorporation of "if the operations of such entities affect commerce," language from the definition of "public accommodation" in Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(b)); 42 U.S.C. § 12181(1) (defining "commerce" in Title III in same manner as in Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(c)).

[5] *See* n. 9 *infra*.

[6] 42 U.S.C. § 12181(7) defines as a "public accommodation" a private entity that falls into any of the listed categories of establishments if its operations affect commerce. The categories include (A) places of lodging; (B) establishments serving food or drink; (C) places of exhibition or entertainment, including motion picture houses, theaters, concert halls, and stadiums; (D) places of public gathering, including auditoriums, convention centers, and lecture halls; (E) sales or rental establishments; (F) service establishments; (G) public transportation stations; (H) places of public display or collection; (I) parks, zoos, amusement parks, and other

cover, with a few exceptions, such as the sale or rental of private housing,[7] almost every facet of American life in which a business establishment or other entity serves or comes into contact with members of the general public.

Congressional committee reports explained the expanded scope of the ADA's coverage of public accommodations:

> It is critical to define places of public accommodation to include all places open to the public, not simply restaurants, hotels, and places of entertainment (which are the types of establishments covered by title II of the Civil Rights Act of 1964) because discrimination against people with disabilities is not limited to specific categories of public accommodations. The Attorney General has stated that we must bring Americans with disabilities into the mainstream of society "in other words, full participation in and access to all aspects of society."

H.R. Rep. No. 101-485, pt. 2, at 35 (1990), quoting *Americans with Disabilities Act: Hearings on H.R. 2273 Before the House Comm. on the Judiciary, Subcomm. on Civil and Constitutional Rights*, 101st Cong. at 192 (1989) (testimony of Attorney General Thornburgh).

3. *Building Upon the Foundation of Title II of the Civil Rights Act of 1964.*

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places of recreation; (J) schools and other places of education; (K) social service establishments; and (L) gymnasiums, health spas, bowling alleys, golf courses, and other places of exercise or recreation.

[7] Discrimination on the basis of disability in housing is prohibited under the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619, 28 U.S.C. §§ 2341, 2342; 42 U.S.C. § 3601 *et seq.*

In enacting the ADA, Congress consciously built upon the foundation established by prior civil rights laws, particularly the Civil Rights Act of 1964.[8] By doing so, Congress embraced the jurisprudential framework that had developed around the Civil Rights Act.

Title II precedents afforded guidance as to how broadly a nondiscrimination provision regulating public accommodations should be interpreted. Two principles established in Title II cases are particularly relevant to the present controversy:

> (1) The coverage of a public accommodation should be interpreted broadly consistent with "the overriding purpose" of Title II to eliminate discrimination. *Daniel v. Paul*, 395 U.S. 298, 306-308 (1969).[9]
>
> (2) An entity can qualify as a public accommodation because of a service it provides to direct participants in some sport or activity as well as because it entertains spectators. *Id.* [10]

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[8] *See, e.g.*, 42 U.S.C. § 12188 (adopting remedies and procedures set forth in Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(a) as remedies and procedures under Title III); 42 U.S.C. § 12187 (exempting from Title III "private clubs or establishments exempted from coverage under Title II of the Civil Rights Act of 1964 (42 U.S.C. § 2000-a(e))"); 42 U.S.C. § 12117(a) (adopting as Title I remedies and procedures those available under certain provisions of Title VII of the Civil Rights Act of 1964); 42 U.S.C. § 12181(7) (incorporating "if the operations of such entities affect commerce" language from definition of public accommodation in Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(b)); 42 U.S.C. § 12181(1) (defining "commerce" in Title III in same manner as in Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(c)).

[9] *See also Miller v. Amusement Enterprises, Inc.*, 394 F.2d 342, 349 (5th Cir. 1968) (Title II not to be read "with narrowed eye but with open minds attuned to the clear and strong purpose of the Act, namely, to secure for all citizens the full enjoyment of facilities described in the Act which are open to the general public"; it is "well established" that these provisions are "to be liberally construed and broadly read").

[10] *See also Miller v. Amusement Enterprises, Inc.* 394 F. 2d at 350. (Phrase

Two of the Title II precedents involved alleged discrimination against golfers. *Evans v. Laurel Links*, 261 F.Supp. 474 (E.D. Va. 1966), was a class action seeking to require the operators of a commercial golf course to permit African-Americans to play on their course. The court ruled that the golf course was a place of exhibition or entertainment under Title II. *Id.* at 477. While "[t]he Act prohibits discrimination among spectators who patronize a place of exhibition or entertainment," said the court, "its application is not limited to spectators if the place of exhibition or entertainment provides facilities for the public to participate ...." *Id.* In words that are manifestly applicable to the present case, the court concluded that Title II "provides that all persons are entitled to the full and equal enjoyment of the facilities, privileges, advantages and accommodations of a covered establishment." In short, the statute protects both golf spectators and participants from discrimination. *Id.*

In *Wesley v. City of Savannah*, 294 F. Supp. 698 (S.D. Ga. 1969), the court held that Title II prevented a private golf association from engaging in racial discrimination in a city golf tournament. *Id.* at 700-03. Construing the coverage of Title II liberally, the court enjoined the association from holding the tournament until it ended its discriminatory practices. *Id.*

As described above, the scope of the public accommodation provisions of Title III encompass and then expand the scope of the public accommodation provisions of

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"place of entertainment" in Title II "includes both establishments which present shows, performances and exhibitions to a passive audience and those establishments which provide recreational or other activities for the amusement or enjoyment of its patrons"); *United States v. Slidell Youth Football Association*, 387 F. Supp. 474. 480-82 (E.D. La. 1974) (both intentional exclusion of black football players, and resultant denial to their parents of opportunity of watching their children play football violated Title II); *United States v. Johnson Lake, Inc.*, 312 F. Supp. 1376, 1380 (S.D. Ala., 1970) (racial discrimination at swimming and dancing facilities subject to Title II both because of effects on participants and those who come to watch participants).

Title II of the Civil Rights Act of 1964. Because participants in athletic contests were covered under the Civil Rights Act of 1964, Congress certainly intended such activity to be covered under Title III.

B. Title III Protects Persons Such as Respondent Who Perform or Participate in Events at Places of Public Accommodation.

The plain language of Title III affords protection from discrimination to persons such as respondent who participate in events at a place of public accommodation. Respondent seeks to obtain the full and equal enjoyment of "the goods, services, facilities, privileges, advantages, or accommodations" of a golf course. 42 U.S.C. § 12182(a). The statute says that in such a situation "[n]o individual shall be discriminated against on the basis of disability…." *Id.*

This straightforward reading of the statute is reinforced by the principles established under Title II of the Civil Rights Act of 1964 discussed in section I.A.3 *supra*. Thus, petitioner's tournaments are a public accommodation because they provide services to the competitors and because they entertain spectators.

1. Petitioner's Purported Exceptions to the Statutory Language of Title III.

To avoid the application of the plain language of Title III, petitioner attempts to invent exceptions to Title III's coverage. Petitioner suggests at various places in its brief that Title III does not cover "players," "competitors," "performers," "participants," "independent contractors," or activities "inside the ropes," Pet. Br. at 12-28. However worded, none of these contentions has any basis in the language or legislative history of the ADA. And, in arguing that implied exceptions should be read into Title III's coverage, petitioner completely ignores

the express language, structure, stated purposes, and spirit of the ADA.

Petitioner's contention is predicated on an illogical interpretation of the terms "clients or customers." *Id.* at 19-22. The phrase "clients or customers" appears in an ADA provision clarifying that public accommodations which contract to have goods, services, facilities, privileges, advantages, or accommodations provided are still responsible for ensuring that the ultimate beneficiaries, the "clients or customers," are provided such goods, services, facilities, privileges, advantages, or accommodations without discrimination on the basis of disability. 42 U.S.C. § 12182(b)(1)(A)(iv). The provision uses the phrase "clients or customers" to refer to persons who receive or seek to obtain goods, services, facilities, privileges, advantages, or accommodations at a place of public accommodation. *Id.* Nothing in the statute or its legislative history suggests that this phrase was intended to narrow the class of beneficiaries of public accommodations to be protected from discrimination under the statute.

Petitioner's analysis fails to recognize that a public accommodation may simultaneously serve various types of clients and customers. People who come to browse and buy at a flea market, for example, clearly are "clients or customers" of the facility. At the same time, however, the facility rents spaces to individual vendors. The vendors are "clients or customers" of the flea market because they seek to use and enjoy the services, facilities, privileges, advantages, and accommodations it provides. If the flea market had a rule excluding deaf vendors, the ADA would prohibit it just as clearly as if the flea market barred deaf shoppers.

The PGA Tour, Inc. ("PGA") serves a class of customers and clients comprised of spectators at PGA events. At the same time, it serves another class of clients or customers -- the golfers who compete in its events. As an operator of events in a place of public accommodation, the PGA is

statutorily required not to discriminate on the basis of disability against any class or type of clients or customers it serves.

Petitioner makes several arguments concerning Title III's relationship to "employment" activities. First, petitioner contends that respondent is a "worker" because he seeks to earn his living as a [PGA Tour] player," and his "workplace" discrimination claim cannot be within the scope of Title III. *See* Pet. Br. at 16-18, 29-30. Conversely, petitioner argues that granting respondent Title III relief would open the door to numerous job-related claims by workers, like respondent, deliberately left uncovered by Title I. *Id.* at 24.

These arguments are merely linguistic sleights-of-hand. To the extent that terms like "worker," "work," "working," and "workplace" are used in discussing ADA provisions, they must be understood as synonymous with "employee," "employment," and "place of employment." With such an understanding, petitioner's purported conflict between Title I's limitation to employers having fifteen or more employees and the broad coverage of Title III disappears. *Id.* at 17-18, 24-25, 28-29.

All "employment" matters are within the scope of Title I; when Congress exempted those employers having fewer than fifteen employees from Title I, it precluded employees of those small employers from any coverage for claims arising out of their employment situation. They cannot pursue these claims under Title III because, as petitioner accurately points out, "Title III is not intended to govern any terms of employment provided by providers of public accommodations .... " *Id.* at 15, (quoting H. Rep. No. 101-485, pt. 2, 101st Cong., 2d Sess. 99 (1990) (emphasis added)). The report adds to the quoted language that "employment practices are governed by Title I of this legislation." *Id.* (emphasis added). Any type of "goods, services, facilities, privileges, advantages, or accommodations" that does not constitute "employment," including the performances or activities of athletes, contestants, and other performers who may vie for monetary or

other rewards at places of public accommodation, is governed by Title III.

That respondent may seek to earn a living as a player in PGA Tour events is completely irrelevant to whether he is doing so as an employee of the PGA. A professional gambler may earn his living playing games of chance at a casino, but that fact does not make the gambler an employee of the casino, nor any less a "customer or client"; the gambler is clearly protected under the language of Title III regardless of whether the games played are merely a light diversion or an attempt to make a living. Similarly, Title III protects a professional golfer.

2. When Congress Sought to Create Exceptions to, or Limitations on, Title III Coverage, It Did So Expressly.

When Congress wanted to create exceptions to the expansive coverage it imposed under Title III, it did so clearly and explicitly. For example, Congress expressly incorporated into the ADA the so-called "Mrs. Murphy's Boarding House exception" to lodging establishments, set out in Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a(b)(1). *See* 42 U.S.C. § 12181(7)(A).[11] Likewise, based upon concerns voiced by the Attorney General,[12] Congress added an exemption from Title III for "religious organizations or entities controlled by religious organizations." 42 U.S.C. § 12187. Section 12187 contains another exemption added by Congress

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[11] Excepted is "an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor."

[12] *See Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong. at 200 (1989) (testimony of Attorney General Thornburgh) ("any new legislative initiative should avoid potential confrontation with the First Amendment to the Constitution that might arise with the coverage of religious institutions").

to the coverage of Title III by explicitly incorporating by reference the exemption for "private clubs or establishments exempted from coverage under Title II of the Civil Rights Act of 1964." 42 U.S.C. § 2000-a(e).

The ADA does not create exceptions by implication; it does so clearly and expressly.[13] Congress did not intend that additional exceptions, not provided in the text of the Act, should be read into the ADA.

II. PETITIONER CANNOT DEMONSTRATE THAT THE MODIFICATION REQUESTED BY RESPONDENT WOULD "FUNDAMENTALLY ALTER THE NATURE" OF PGA TOUR EVENTS.

The ADA's central objective of allowing persons with disabilities to participate and compete on an equitable basis relative to other people[14] necessitates reasonable adjustments to the way activities and programs are structured.

[13] Among many other examples of express exclusions and exemptions established in the ADA, *see* 42 U.S.C. § 12208 (excluding transvestites from the terms "disabled" or "disability"); *id.* § 12210(a) (excluding individuals currently engaged in the illegal use of drugs from the term "individual with a disability"); *id.* § 12211(a) (declaring that homosexuality and bisexuality are not disabilities under the ADA); *id.* § 12211(b) (excluding 11 different mental conditions from the term "disability").

[14] *See, e.g.*, Senator Dole's insertion into the record of the "poignant remarks" of James Brady, President Reagan's former press secretary, 135 CONG. REC. S 10791 (daily ed. Sept. 7, 1989) ("Passage of the ADA will increase the acceptance, dignity, and full participation of citizens with disabilities. We do not want pity or sympathy. All we want is the same civil rights and opportunities that all citizens have. We want fairness, acceptance, and the chance to contribute fully to our nation -- just like everyone else"); 135 CONG. REC. S 10711 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin) ("For too long, individuals with disabilities have been excluded, segregated, and otherwise denied equal, effective, and meaningful opportunity to participate in the economic and social mainstream of American life. It is time we eliminate these injustices.")

Accordingly, Congress established a reasonable modification requirement as a component of provisions prohibiting discrimination on the basis of disability in public accommodations. 42 U.S.C. §12182(b)(2)(A)(ii). Pursuant to this provision, Title III of the ADA requires the petitioner to allow respondent to use a golf cart as a reasonable modification during PGA Tour events unless the petitioner can demonstrate it would fundamentally alter those events. The district court correctly concluded that it had a duty to make an independent inquiry into the purpose of the petitioner's no-ride/walking rule and found that the modification to the rule sought by respondent would not frustrate the purpose of the rule nor fundamentally alter the nature of PGA Tour events (J.A. 66-73). [15]

[15] The opinion of the court of appeals (J.A. 34-48) is reported at 204 F.3d 994 (1998). The opinions of the district court (J.A. 49-73, 74-88) are reported at 994 F. Supp. 1242 (1998) and 984 F. Supp. 1320 (1998). The district court's focus on the "purpose" rather than simply the content of a rule or requirement has long been an element of disability nondiscrimination analysis. For example, shortly after the decision in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), the Secretary of Health, Education and Welfare, sent a letter to college presidents to clarify the impact of the *Davis* ruling. The letter declared:

> It is, of course, the institution's prerogative to define the role and purpose of its educational program and to determine academic requirements, *i.e.*, to make what the Supreme Court calls "legitimate academic policy." However, if a college excludes a [person with a disability] from its program on the basis of his or her inability to complete course requirements, Section 504 [of the Rehabilitation Act] requires that the college be able to demonstrate that the requirements are essential to the scope and purpose of the program.

Letter of Patricia Roberts Harris to College Presidents (Oct. 5, 1979). Similarly, in the employment context, the Equal Employment Opportunity Commission has declared:

> In identifying an essential function to determine if an individual with a disability is qualified, the employer should focus on the purpose of the function and the result to be accomplished, rather than the manner in which the function presently is performed.... Although it may be essential that the function be performed,

A. Petitioner's Analytic Framework.

Petitioner, relying in part on the ruling of the Seventh Circuit in *Olinger v. United States Golf Ass'n*, 205 F.3d 1001 (7th Cir. 2000), proposes a framework for analyzing requests for "reasonable modifications" to requirements imposed by its rules or the rules of any professional sports organization. Petitioner assumes that there must always be absolute uniformity in the application of all rules to "highest-level" events.[16] Pet. Br. at 32-35. It declares that "perhaps the most fundamental attribute of professional sports in general, and of elite golf tournaments in particular" is "that all competitors are required to play by the same substantive rules." *Id.* at 32-33. Petitioner contends that "[t]his need for uniformity does not vary with the 'individual circumstances' of a particular competitor, and an examination of those circumstances... is neither necessary nor justified." *Id.* at 35, n. 24.

The only impact of the ADA on this process, according to petitioner, is that a court may "question whether a particular rule may, in fact, have a possible (non-trivial) effect on the outcome of the athletic competition." *Id.* at 34-35. Thus, the only instance in which the ADA would result in an exception or modification to a rule would be where the rule has no impact or only a "trivial" one, in which case "it could be waived for any competitor." *Id.* at 35.

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frequently it is not essential that it be performed in a particular way.

Equal Employment Opportunity Commission, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT at II-16 (§ 2.3(a)) (1992) (emphasis in original).

[16] The issue of whether a uniform waiver of the no-ride/walking rule would, in fact, have any non-trivial impact on the outcome of PGA top-level tournaments is, of course, a continuing matter of dispute decided in respondent's favor in the lower courts.

Petitioner asks this court to disregard the statutory language, framework, and legislative history of the ADA in favor of an argument that says, in effect, "we'll continue to do things the way we've always done them." Congress enacted the ADA to eliminate discrimination arising from just such an attitude.

B. The ADA Statutory Framework for Determining What Is a Fundamental Alteration.

The ADA requires public accommodations to make "reasonable modifications to policies, practices, or procedures," to permit an individual with a disability an opportunity to obtain the goods, services, facilities, privileges, or accommodations being offered; a business is not required, however, to make modifications that it "can demonstrate . . . would fundamentally alter the nature of such goods, services, facilities, privileges, or accommodations." 42 U.S.C. § 12182(b)(2)(A)(ii).

1. The Role of the Reasonable Modification Requirement.

In drafting the ADA, Congress derived the "reasonable modification" concept, 42 U.S.C. § 12182(b)(2)(A)(ii), and its close analog, "reasonable accommodation," 42 U.S.C. § 12111(9), from prior disability nondiscrimination statutes,[17] regulations,[18] and case law.[19]

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[17] *See* 42 U.S.C. § 3604(f)(3)(B) (the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619) (requirement "to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such persons [*i.e.*, persons with disabilities] equal opportunity to use and enjoy a dwelling"); 29 U.S.C. §794a(a)(1) (Section 505 of the Rehabilitation Act, added in 1973) (authorized courts to "take into account the reasonableness of the cost of any necessary workplace accommodation").

In the U.S. Commission on Civil Rights' report, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES (1983),[20] the Commission traced the purpose and history of the reasonable accommodation concept. The Commission identified its basic purpose as follows:

> Discrimination against [people with disabilities] cannot be eliminated if programs, activities, and tasks are always structured in the ways people with "normal" physical and mental abilities customarily undertake them. Adjustments or modifications of opportunities to permit [people with disabilities] to participate fully have been broadly termed "reasonable accommodation." *Id. at* 102.

[18] *See, e.g.*, 41 C.F.R. § 60-741.6(d) (1990) (Department of Labor regulation to implement Section 503 of Rehabilitation Act of 1973); 45 C.F.R. § 84.12 (1990) (HHS regulation to implement Section 504 of the Rehabilitation Act).

[19] *See, e.g., School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 287 (1987); *Alexander v. Choate*, 469 U.S. 287, 301 (1985).

[20] *See* S. Rep. No. 101-116, at 6 (1989); H.R. Rep. No. 101-485, pt. 2, at 28 (1990). The Court has also cited ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES as authority regarding the nature of discrimination on the basis of disability. *Alexander v. Choate*, 469 U.S. 287, 295-96, nn. 12 and 16 (1985).

The report offered the following definition of reasonable accommodation: "providing or modifying devices, services, or facilities or changing practices or procedures in order to match a particular person with a particular program or activity. Individualizing opportunities is this definition's essence." *Id.*

Prior to the enactment of the ADA, the Court had recognized the importance of a reasonable accommodation requirement in eliminating discrimination against individuals with disabilities in both the employment[21] and the non-employment context.[22]

In drafting the ADA, Congress established a "reasonable modification" requirement in Title III (42 U.S.C. § 12182(b)(2)(A)(ii)), and a "reasonable accommodation" requirement in the employment context (Title I). See *id.* §§ 12111(9), 12112(b)(5)(A). In *Alexander v. Choate*, the Court used the terms "reasonable accommodations,"

[21] *School Board of Nassau County v. Arline, 480 U.S. 273 (1987). In Arline*, the Court declared unequivocally that "[e]mployers have an affirmative obligation to make a reasonable accommodation for a handicapped employee." 480 U.S. at 289 n. 19. The Court termed it "well established" that in employment discrimination cases under Section 504, among "[t]he basic factors to be considered" is "whether any reasonable accommodation by the employer would enable the handicapped person to perform [the essential functions of the job in question]." *Id.* at 287 and n. 17. The Court remanded the case and directed the district court to determine, *inter alia*, "whether the School Board could have reasonably accommodated" the plaintiff. *Id.* at 288-289.

[22] *Alexander v. Choate*, 469 U.S. 287 (1985). In *Alexander*, the Court declared that the nondiscrimination mandate of Section 504 of the Rehabilitation Act of 1973 requires that individuals with disabilities be provided "meaningful access" that would be effectively denied unless reasonable accommodations are required. 469 U.S. at 301. The Court recognized a need for "those changes that would be reasonable accommodations," *id.* at 300 n. 20., and noted with approval that "[t]he regulations implementing § 504 are consistent with the view that reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access." *Id.* at 301 n. 21.

"reasonable adjustments," and "reasonable modifications" interchangeably. 480 U.S. at 299–301. In the ADA, the terms "reasonable modification" and "reasonable accommodation" have very similar meanings conceptually.

2. *Public Accommodations Have the Burden of Proof on the Fundamental Alteration Issue.*

The ADA imposes the burden of proof on a public accommodation to show that a requested reasonable accommodation that it seeks to avoid would constitute a "fundamental alteration." 42 U.S.C. § 12182(b)(2)(A)(ii) provides that a public accommodation is not required to make modifications that "the entity can demonstrate ... would fundamentally alter the nature of such goods, services, facilities, privileges, or accommodations." The imposition of this burden of proof on public accommodations is consistent with the assignment of the burden of proof to covered entities under the Rehabilitation Act of 1973[23] and Title I of the ADA.[24]

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[23] *See, e.g.*, 41 C.F.R. § 60-741, Appendix A at paragraph 1 (2000). (Section 503 regulation) ("unless the contractor can demonstrate that the accommodation would impose an undue hardship on operation of its business"); 45 C.F.R. § 84.12 (a) (1999). (HHS Section 504 of the Rehabilitation Act of 1973 regulation regarding recipients of federal financial assistance) ("unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program"); 29 C.F.R. § 1614.203(c)(1) (2000) (EEOC Section 501 regulation) ("unless the agency can demonstrate that the accommodation would impose an undue hardship on the operations of its program"); *Prewitt v. U.S. Postal Service*, 662 F.2d 292, 308 (5th Cir. 1981) ("the burden of proving inability to accommodate is upon the employer").

[24] 42 U.S.C. § 12112(b)(5)(A) ("unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity"). *See also* H.R. Rep. No. 101-485, pt. 3, at 42 (1990) ("Like Section 504 of the

3. *Stringency of the Fundamental Alteration Standard.*

The concept of fundamental alteration originated in the Court's decision in *Southeastern Community College v. Davis*, 442 U.S. 397, 410 (1979), in which it held that, under Section 504 of the Rehabilitation Act, a university was not required to modify its clinical nursing program by converting it into a program of purely academic classes to accommodate a woman with a hearing impairment. "Such a fundamental alteration," the Court said, "is far more than the 'modification' the regulation requires." *Id.*

In applying the "fundamental alteration" concept, other courts have spelled out some of its implications: alterations are not required if they would endanger a program's viability;[25] massive changes are not required;[26] modifications involving a "major restructuring" of an enterprise or that "jeopardize the effectiveness" of a program are not required;[27] modifications are not required if they would so alter an enterprise as to create, in effect, a new program.[28] In 1984, legal commentators proposed the following definition of "fundamental alteration": "(1) a substantial change in the primary purpose or benefit of a program or activity; or (2) a substantial impairment of necessary or essential components required to achieve a

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Rehabilitation Act, the burden is on the employer to demonstrate that the needed accommodation would cause an undue hardship.").

[25] *New Mexico Ass'n of Retarded Citizens v. New Mexico*, 678 F.2d 847, 855 (10th Cir. 1982).

[26] *Dopico v. Goldschmidt*, 687 F.2d 644, 653 (2d Cir. 1982).

[27] *Rhode Island Handicapped Action Comm. v. Rhode Island Pub. Transit Auth.*, 549 F.Supp. 592, 607, 611 (D.R.I. 1982).

[28] *Doe v. Colautti*, 592 F.2d 704, 707-09 (3d Cir. 1979); *Turillo v. Tyson*, 535 F.Supp. 577, 587 (D.R.I. 1982); *Lynch v. Maher*, 507 F.Supp. 1268, 1280 (D.Conn. 1981); *Rhode Island Handicapped Action Comm. v. Rhode Island Pub. Transit Auth.*, 549 F.Supp. 592, 607 (D.R.I. 1982).

program or activity's primary purpose or benefit."[29] The first type of fundamental alteration would change the program or activity into something else, as in the *Davis* case; the second would cause it to fail.

In ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES, *supra*, the U.S. Commission on Civil Rights discussed the origins of the fundamental alteration concept in *Southeastern Community College v. Davis*, and concluded that "[t]his qualitative restriction makes unnecessary modifications that run the risk of affecting the program's essence." ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES at 113. The report elaborates as follows:

> The implication of the Court's analysis is that some program functions and program requirements are essential, while others may be only incidental. The incidental-essential distinction is also consistent with the premise that there are frequently equally effective ways in which tasks and activities may be restructured to achieve similar objectives.

Id. at 124. The Congress acted upon this understanding of the concept of "fundamental alteration" by incorporating it as an outer limit on the duty of public accommodations to make reasonable modifications. In implementing the statute and assisting covered entities to comply with the ADA, the U.S. Department of Justice has defined fundamental alteration as a "modification that is so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages or accommodations offered." U.S. Department

[29] Robert Burgdorf Jr. and Christopher Bell, *Eliminating Discrimination Against Physically and Mentally Handicapped Persons: A Statutory Blueprint*, 8 MENTAL & PHYSICAL DISABILITIES LAW REPORTER 64, 70 (Jan./Feb. 1984).

of Justice, THE AMERICANS WITH DISABILITIES ACT: TITLE III TECHNICAL ASSISTANCE MANUAL at 27 (1990).

The Congressional committee reports give very few examples of the application of the fundamental alteration limitation. Each of the examples involves a relatively extreme situation that clearly would change the nature or seriously damage the enterprise involved.[30]

As the legislative record and history show, Congress intended the standard of altering the essential nature of an activity or service to be a stringent one.

4. Individualized Determinations.

Because "[i]ndividualizing opportunities" is the "essence" of the reasonable modification/reasonable accommodation requirement, U.S. Commission on Civil Rights, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 102 (1983), it is hardly surprising that determinations regarding the need for particular modifications, and whether a particular proposed modification constitutes a fundamental alteration, must be made on a case-by-case basis involving an examination of the specific factual situation involved. In its ADA report, the House Judiciary Committee observed that "[a] reasonable accommodation should be tailored to the needs of the

[30] Two of the reports indicate that physicians who specialize in treating "burn victims" do not have to modify their practices to treat a deaf individual who does not have burns. S. Rep. No. 101-116, at 62 (1989); H.R. Rep. No. 101-485, pt. 2, at 105-106 (1990). And the House Committee on the Judiciary report states that "[i]t would not be a violation of this title to refuse to modify a policy of not touching delicate works of art for a person who is blind if the touching threatened the integrity of the work." H.R. Rep. No. 101-485, pt. 3, at 59 (1990). Changing the business of a public accommodation to another business and damaging delicate works of art are the types of harm to the essential nature of an activity that the fundamental alteration limitation contemplates.

individual and the requirements of the job." H.R. Rep. No. 101-485, pt. 3, at 39 (1990). The Senate Labor Committee and House Education and Labor Committee reports both concurred that reasonable accommodations involve a "fact-specific, case-by-case approach." S. Rep. No. 101-116, at 31 (1989); H.R. Rep. No. 101-485, pt. 2, at 62 (1990). One component of this individualized determination involves resolving whether or not the public accommodation has, pursuant to the statutory language, "demonstrated" that a particular modification would entail a fundamental alteration of the particular good, service, facility, privilege, advantage, or accommodation at issue.

C. Application of the ADA's Fundamental Alteration Limitation in the Present Case.

The analytic framework for fundamental alteration established by the ADA applies fully to the claim of the petitioner in this case. Under the statute, petitioner is required to make the reasonable modification sought by respondent unless petitioner "can demonstrate" that it would entail a fundamental alteration to the "nature of the goods, services, facilities, privileges, advantages or accommodations" petitioner provides at its events. 42 U.S.C. § 12182(b)(2)(A)(ii). The "reasonable modification" requirement plays a crucial role in ensuring meaningful opportunities for people with disabilities and is central to the non-discrimination mandate of the ADA. Accordingly, fundamental alteration claims must be assessed against a stringent standard requiring that a modification be so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages or accommodations offered. The burden of demonstrating that a fundamental alteration will occur is on respondent and such a showing must be done on a case-by-case basis.

The application of these principles inevitably leads to the conclusion reached by the district court and the Ninth Circuit in this case -- that petitioner has not shown that use of a golf cart by respondent would fundamentally alter petitioner's tour events. Since November of 1997, respondent has used a golf cart in tour events, without destroying the integrity or threatening the essential nature of the PGA Tour. *Martin v. PGA Tour, Inc.*, 984 F. Supp. 1320, 1322 (D. Or. 1998). Petitioner nonetheless seeks to establish a fundamental alteration claim by arguing that any change to its substantive rules (or those of any high level professional sports competition), by definition constitutes a fundamental alteration, independent of the individual circumstances of any particular competitor or any particular requested accommodation. *See* Pet. Br. at 32-36. In addition, petitioner argues that "[i]t would impose a substantial burden on the Tour" to engage in individualized determinations of the impact of a modification. *Id.* at 40. Both of these contentions are misguided. The most fundamental flaw in petitioner's arguments that (1) uniformity of its rules should be inviolable, and (2) it should escape individualized modifications because they would pose a substantial burden, is that neither of them has any basis in either the statutory language or the legislative history of the ADA. Petitioner would carve out areas of immunity from statutory regulation and create new standards excusing noncompliance that Congress did not see fit to establish. As the Ninth Circuit observed, petitioner's position "would read the word 'fundamentally' out of the statutory language ...." J.A. 44.[31]

Every category of covered entity under the ADA, including employers, state and local government entities, public transportation providers, and various types of public accommodations would certainly defend the need for

[31] The opnion of the Court of Appeals is reported at *Martin v. PGA*, 204 F 3d 994 (1998).

uniformity of their rules and operational practices, and resist any individualized determinations that would pose additional burdens on them. Yet sound public policy requires, and the ADA demands, that such uniformity in the form of one-size-fits-all rules, practices, and procedures must give way, and some administrative and logistical responsibilities must be performed, in order to give people with disabilities an opportunity to participate.

Congress could have created a "need-for-uniformity" exception to the requirements of Title III, much as it provided an exception for situations involving a "direct threat" to health or safety. 42 U.S.C. § 12182(b)(3). Congress chose to create no such exception in defining the fundamental alteration concept and there is absolutely no hint of any congressional intent that petitioner's wished-for exceptions should be read into the statute.

Moreover, the factual premises upon which petitioner bases its asserted exceptions are not sound. The Ninth Circuit found that "[n]othing in the record establishes that an individualized determination would impose an intolerable burden on the PGA." J.A. 47. This finding is particularly determinative in light of petitioner having the burden to demonstrate fundamental alteration. And petitioner's insistence on the necessity of absolute uniformity in the application of its rules and the impracticality of administering individualized waivers is wholly undercut by the *Modification of the Rules of Golf for Golfers with Disabilities*, adopted by the United States Golf Association (USGA) and the Ancient Golf Club of St. Andrews, Scotland -- the official promulgators of the Rules of Golf. J.A. 70-72.

The Modification, posted at the USGA website (http://www.usga.org/rules/rule_2000/disabled.html), allows a variety of exceptions to the Rules for golfers with various disabilities. Pursuant to the Modification, the USGA authorizes deviations from the usual rules of golf to permit golfers with disabilities to play on an equitable basis without

an undue advantage over other players through a process that includes subjective determinations and case-by-case decisionmaking. Allowing modifications to the application of rules to permit players such as respondent to compete on an equitable basis would no more "fundamentally alter" PGA Tour events than it has changed the essence of golf under USGA rules. Under the clear statutory language of the ADA, petitioner must be required to make the kinds of reasonable modifications respondent is seeking in this case.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to affirm the decision of the United States Court of Appeals for the Ninth Circuit.

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DEC 12 2000

No. 00-24

IN THE

Supreme Court of the United States

PGA TOUR, INC.,

Petitioner,

v.

CASEY MARTIN,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief for American Association of Adapted Sports Programs, America's Athletes with Disabilities, Dwarf Athletic Association of America, National Wheelchair Basketball Association, United States Cerebral Palsy Athletic Association, United States of America Deaf Sports Federation, Disabled Sports, USA, Wheelchair Sports, USA and United States of America Association of Blind Athletes, *Amici Curiae*, in Support of the Respondent, Casey Martin

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QUESTIONS PRESENTED

1. Whether the ADA prohibits discrimination against any *individual* who seeks access to a place of public accommodation regardless whether that person may also enjoy some financial benefit from his/her access or participation?

2. Whether the ADA requires a modification of a rule created by a professional sport organization in order to provide a reasonable accommodation to a person with a disability under Title III?

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INTEREST OF THE *AMICI CURIAE*[1]

The *amici*, American Association of Adapted Sports Programs[2], America's Athletes with Disabilities[3], Dwarf Athletic Association of America[4], National Wheelchair Basketball Association[5], United States Cerebral Palsy Athletic Association[6], United States of America Deaf Sports Federation[7],

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1. Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court. This brief was not written in whole or in part by counsel for a party, and no person or entity other than the *amici curiae*, their members, or their counsel have made monetary contribution to the preparation and submission of this brief.

2. AAASP's mission is to enhance the health, independence and future economic self sufficiency of youth with physical disabilities by facilitating a national disability sports movement, assisting communities in creating the best member programs possible for physically disabled youth electing to compete in team and individual sports on a local, regional and national level. *See* website at: www.aaasp.org

3. AAD's mission is to promote and sponsor sports, recreation, leisure health and fitness activities for children and adults with physical disabilities. *See* website at: www.americasathletes.org

4. DAAA was formed in 1985 to develop, promote and provide quality amateur level athletic opportunities for dwarf athletes in the United States. *See* website at: www.daaa.org

5. NWBA is comprised of 181 basketball teams within twenty-two conferences. The NWBA was founded in 1948, and today consists of men's, women's, intercollegiate, and youth teams throughout the United States of America and Canada. *See* website at: www.nwba.org

6. USCPAA provides assistance to member athletes with cerebral palsy, stroke, and traumatic brain injuries in coordinating their training and strives to enable its athletes to compete at their peak on local, regional, national, and international levels. *See* website at: www.uscpaa.org

7. USDSF provides year-round training and athletic competition in a variety of sports at the state, regional, national, and international level for developing and elite athletes. USDSF assists athletes in developing physical fitness, sportsmanship, and self-esteem. *See* website at: www.usadsf.org

Disabled Sports, USA[8], Wheelchair Sports, USA[9], and United States Association of Blind Athletes[10] provide services and support to disabled athletes, including elite disabled athletes, throughout the United States. Six of the *amici* coordinate training, competitions, and player selection and eligibility for the Paralympic and Deaf World Games as disabled sport organizations under the Ted Stevens Olympic and Amateur Sports Act[11], 36 U.S.C. §§ 220501-220529. The premier amateur sports competitions organized solely for disabled athletes is the Paralympics, which takes place every four years immediately following the Olympics, and the Deaf World Games. Growth not only in the participation numbers of Paralympic athletes, but also the size and prestige of the Paralympic Games prompted Congress in 1998 to amend the Amateur Sports Act of 1978 to

8. DS/USA's mission is to provide the opportunity for individuals with physical disabilities to gain confidence and dignity through participation in sports, recreation and related educational programs. Founded in 1967 Disabled Sports, USA is the nation's largest multi-sport, multi-disability organization. A national, non-profit, educational organization, DS/USA provides sports and recreation services to over 60,000 people annually, through a network of over 80 community-based chapters nationwide. *See* website at: www.dsusa.org

9. WSUSA was founded in 1956 as the National Wheelchair Athletic Association, the name of the organization was changed in 1994 to Wheelchair Sports, USA, to better reflect the organization's mission and goals which includes providing sport opportunities for elite wheelchair athletes. *See* website at: www.wsusa.org

10. The mission of USABA is to change the attitudes about the abilities of the blind and visually impaired. Since its founding in 1976, the USABA has reached over 100,000 blind individuals. During that time, the organization has emerged as more than just a world-class trainer of blind athletes; it has become a vocal champion of the abilities of America's legally blind residents. *See* website at: www.usaba.org

11. Dwarf Athletic Association of America, U.S. Cerebral Palsy Athletic Association, U.S.A. Deaf Sports Federation, Disabled Sports, USA, Wheelchair Sports, USA, and U.S. Association of Blind Athletes are the only disabled sport organizations that serve as governing authority for the training and selection of elite athletes for the Paralympics or Deaf World Games.

expand opportunities for sport for people with disabilities and to integrate disabled sport with non-disabled sport organizations. The amended law directs the USOC to act as the National Paralympic Committee to encourage and provide assistance to amateur athletic programs and competition for disabled individuals, including the expansion of opportunities for meaningful participation by disabled individuals in programs of athletic competition for non-disabled individuals. 36 U.S.C. § 220503(13). A wheelchair event has been included in the Olympic Games program as an exhibition event since 1984 during the Los Angeles Olympic Games. Recently, a clinic and exhibition by the U.S. Luge team to introduce hearing impaired youth to luge and conduct a talent search was also used as an opportunity to show children with disabilities that they could compete alongside non-disabled teammates and competitors. When USA bobsledder Robert Feliciano who is deaf arrived the hearing impaired youth communicated with him through sign language. When the children left he signed "good-bye" to them. Without the hard work of many to integrate sport, that experience may have never occurred.[12]

Disability sport refers to sport designed for or specifically practiced by athletes with disabilities.[13] The USOC oversees the organizations coordinating sport for people with disabilities. These organizations are called Disabled Sports Organizations (DSOs). All the DSOs are responsible for grassroots efforts to promote sport for people with disabilities. It is important to note that the DSOs are most often organized and named by *disability* (cerebral palsy, deaf, blind, dwarf, and wheelchair), whereas National Governing Bodies (NGBs) are named by

12. S. Knowles, *Meeting Bobsledder was Bigger Thrill for Deaf Children than Luge Run*, THE SALT LAKE TRIBUNE, December 13, 1998, at B5.

13. K. DePauw & S. Gavron, *Disability and Sport* (1995).

sport USA Baseball, USA Basketball, USA Hockey).[14] This distinction takes on even more significance in the professional sport segment since professional disability sport organizations do not exist in the United States. Thus, any elite disabled athlete who competes professionally in the United States must compete with non-disabled athletes and is governed by the professional sport's governing body, i.e., the Women's National Basketball Association, National Football League, Major League Baseball, and in this instance, the Petitioner, PGA Tour, Inc. (hereinafter referred to as "PGA"). The DSO *amici* have an interest in this appeal since the outcome may likely affect the access and opportunities afforded the disabled athletes they represent.

SUMMARY OF ARGUMENT

I. Casey Martin is a participant in a professional golf event operated by the PGA. The PGA Tour[15] is a place of public accommodation. Casey Martin as an individual with a disability is entitled to assert a discrimination claim under Title III of the American's With Disabilities Act. 42 U.S.C. § 12181-12182. Casey Martin is not an employee of the PGA; thus, his claim is not governed under Title I of the ADA. 42 U.S.C. § 12111-12112. Section 12181 prohibits discrimination against any individual with a disability. This section does not limit the protection afforded a disabled individual who also happens to have a financial interest or motive in seeking access to the place of public accommodation.

It is undisputed that the PGA is an entity which leases golf courses for the purpose of operating its golf events. Golf courses are expressly identified among the examples contained in Title III as places of public

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14. Eli A. Wolff, *Status of the Seven National Disabled Sports Organizations in the United States and Recommendations for the Future*. Unpublished paper, Brown University (1998).

15. When using the phrases "PGA Tour, Tour, or Tour event" hereinafter, the *amici* are referring to the professional golf events organized and operated by the Petitioner.

accommodation. 42 U.S.C § 12181(7)(L). The PGA erroneously seeks to avoid the clear coverage mandate of this Section by contending that a golf course is not being used as a "place of exercise and recreation" during PGA Tour events. While the categories identified in Section 12181 are considered exhaustive, the examples are not. Thus, even assuming for purposes of argument that the course is not being used for exercise and recreation, the PGA cannot contend in good faith, that it is not being used for purposes of exhibition and entertainment during the presentation of a professional golf event within the scope of section 12181(7)(C).

The competition areas of professional sport contests are clearly not exempted from coverage, and it is highly unlikely that Congress was unaware that professional sports contests took place in "stadiums", "auditoriums", "parks", "gymnasiums", "bowling alleys", and "golf courses". Yet Congress chose not to exclude professional sport contests from coverage of the ADA. Instead, Congress created twelve broad categories of places at which any number of activities or uses may take place. Congress further provided a non-exhaustive list of examples for the 12 categories. Nothing in the legislative history or text of the ADA suggest Congress intended to exempt either the competition areas or spectator areas of a professional sport contest from complying with the ADA. Section 12181(7)(C) clearly applies to places used for "exhibition or entertainment" including but not limited to theaters, concert halls, stadiums, and in this instance, a golf course. The PGA's entertainment objective is obvious and admitted by the LPGA in its *amicus* brief at p. 11 where it states ". . . professional sport depends on its entertainment value for its very existence."

Section 12182(a) provides a general prohibition against discriminating against an "individual" with a disability in the full and equal enjoyment of goods, services, facilities, privileges of any place of public accommodation. The PGA attempts to restrict the broad, general protections established in section 12182(a) to only the "clients or customers" of the

place of public accommodation. No such restrictive reading of the term "individual" is contained in the text of the statute. The reference to "client or customer", however, is expressly limited to sub-section 12182(b)(1)(A)(i-iii). *See*, 42 U.S.C. § 12182(b)(1)(A)(iv). Even if Casey Martin were required to be a client or customer of the PGA, he would clearly fall within the normal and ordinary definition and meaning of the terms "client or customer" as a participant competing on the PGA Tour.

II. The district court's finding that permitting a modification of a rule of golf to allow Casey Martin to use a cart during competition did not constitute a fundamental alteration of the PGA Tour event is well supported by the evidence presented to the district court, and should not be disturbed on appeal. Section 12182(b)(2)(A)(ii) identifies the elements and evidentiary burdens for a Title III discrimination claim. Casey Martin was required to and offered competent evidence that he was an individual with a disability, that a modification was requested, and that the modification requested was reasonable. The burden then shifted to the PGA to demonstrate that the requested modification would fundamentally alter the nature of the PGA Tour event. While PGA proffered evidence that the purpose of its rule requiring competitors to walk at all times during the competition was to inject the element of fatigue into the competition, the district court properly found that such purpose was not being fundamentally altered by permitting Martin to participate with the aid of a cart.

In reaching its findings and conclusions, the district court properly conducted an individual, fact specific inquiry relative to the stated purpose of the PGA rule, and Martin's individual disability and circumstances. An important element of the discrimination claim is the "individual" needs of the disabled person. The PGA's contention that only the nature of the public accommodation should be examined to determine whether a modification of a rule or policy would result in a fundamental alteration rather than conducting an individualized inquiry would be contrary to the broad goals and scope of the ADA.

The PGA also presumes that substantive rules of competition can not be waived without fundamentally altering the nature of the competition. No such presumption is identified in Title III. Section 12182 unambiguously provides that "reasonable modifications in policies, practices, or procedures" must be made. The statute does not say that only "non-substantive policies, practices, or procedures" are subject to modification.

ARGUMENT

I. THE ADA PROHIBITS DISCRIMINATION AGAINST ANY *INDIVIDUAL* WHO SEEKS ACCESS TO A PLACE OF PUBLIC ACCOMMODATION REGARDLESS OF WHETHER THAT PERSON MAY ALSO ENJOY SOME FINANCIAL BENEFIT FROM HIS/HER ACCESS OR PARTICIPATION.

A. Casey Martin's Claims Clearly Arise Under Title III of the ADA, not Title I.

The PGA contends that Casey Martin's claim for relief under Title III (42 U.S.C. § 12181 *et seq.*) of the ADA is actually a discrimination in the workplace complaint since Martin earns a living by participating in professional golf events. It is the contention of the PGA, that if Martin earns a living by participating in professional golf (an activity which PGA creates and provides), that Martin's association with the PGA, even though not characterized as employment, precludes a claim under Title III and limits Martin's remedies to those available pursuant to Title I (42 U.S.C. § 12111 *et seq.*). After restricting Martin's potential claims solely to Title I, the PGA next argues that Martin is an independent contractor; therefore, excluded from coverage of Title I of the Americans with Disabilities Act. Consequently, the PGA contends that Martin, an individual with a disability, is essentially entitled to no protection under the ADA for discriminatory practices by the PGA.

Whether Martin is an employee or an independent contractor under Title I is not an issue that is before this court, and it is further irrelevant to a determination under Title III.[16] It is undisputed that Martin is an individual with a disability. *Martin v. PGA Tour, Inc.*, 204 F.3d 994 (9th Cir. 2000). Title III does not limit its protections only to those individuals who have no financial motive associated with gaining access to a place of public accommodation.[17] The PGA mistakenly attempts to distinguish Martin's circumstances from a person seeking access to a public library for a job related function. (*See*, PGA Brief at p. 21, n.14.) The two situations are indeed analogous and the protections established in Title III are not restricted to only those "individuals" who are seeking access to a place of public accommodation for a non-work related purpose. The statute is silent as to any limitations resulting from the motivation or objectives of the disabled person seeking access. This construction is also consistent with the exclusive framework

16. Title III of the Americans with Disabilities Act applies to places of public accommodation and provides that "[n]o *individual* shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." (Emphasis added). 42 U.S.C. § 12182(a).

17. The Third Circuit has dealt with this issue in the context of a physician with a disability who was denied staff access privileges to a hospital in *Menkowitz v. Pottstown Memorial Medical Center*, 154 F.3d 114 (3rd Cir. 1998). Pottstown argued that since Menkowitz had a "unique business relationship" with the hospital, that he was not an "individual" covered by Title III. *Id.* at 121. The Third Circuit was mindful that Congress did not intend for Title III to govern any terms or conditions of employment. Employment practices are governed by Title I. *Id.* at 119. However, Congress was equally clear that no "individual" could be denied full and equal enjoyment of the goods, services, facilities and privileges of a place of public accommodation. Denying Menkowitz access to the hospital based upon his disability prevented him from benefiting from the hospital facilities needed to render services to his patients.

established in Title I to remedy discriminatory employment practices. Martin did not seek employment with the PGA, rather he sought access to a place of public accommodation, and a reasonable modification of rules defining such access, to permit him the full benefit and enjoyment of the opportunity to participate in a professional sport competition. The PGA Tour is the only elite level professional golf tour in the United States. Denying Martin access to participate on the Tour, denies him access to a place of public accommodation in violation of Title III.

B. The Competition Areas of Elite Sport Competitions Are Covered Under Title III of the Americans with Disabilities Act.

The preamble of the Americans with Disabilities Act demonstrates Congress invoked "the sweep of congressional authority" to enact broad legislation. 42 U.S.C. § 12101(b)(4). Congress enacted the ADA to ensure that individuals with disabilities would no longer face the continued existence of unfair and unnecessary discrimination and prejudice. *Id.* at (a)(9). Congress noted that "historically society has tended to isolate and segregate individuals with disabilities" and discrimination against them "continue[s] to be a serious and pervasive social problem." *Id.* at (a)(2). Congress further found that "individuals with disabilities continually encounter among other forms of discrimination, . . . outright intentional exclusions, . . . overprotective rules and policies, failure to make modifications to existing facilities and practices, . . . segregation, and relegation to lesser services, programs, activities, . . . jobs, or other opportunities." *Id.* at (a)(5). Congress stated that among its purposes in enacting this chapter was to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities. *Id.* at (b)(1) and (2). Excluding athletes with disabilities from participation in elite level athletic competition,

where reasonable accommodations can be made, denies them the "opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous . . ." which Congress so eloquently established as a purpose for the ADA. *Id.* at (a)(9).

ADA analysis should begin by looking at the plain language and the clear intent of the statute. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."[18]

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18. A public accommodation is defined as the following private entities if the operations of such entities affect commerce —

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

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42 U.S.C. § 12182(a) (2000). Prohibited discrimination under Title III includes the denial, on the basis of disability, of the opportunity to benefit from the goods, services, privileges, advantages, or accommodations of a private entity, such as the PGA. The legislative history of the ADA states the twelve categories of entities included in the definition of the term public accommodation are intended to be exhaustive, but the scope of the categories is intended to be construed broadly. Specifically, the history states "[t]he Committee intends that the 'other similar' terminology should be construed liberally, consistent with the intent of the legislation that people with disabilities should have equal access to the array of establishments that are available to others who do not currently have disabilities." H.R. Rep. No. 485, 101st Cong., 2d Sess., pt.2, at 100 (1990), *reprinted in* U.S.C.C.A.N. 303. 383.

The broad and comprehensive language of the legislation favors including the PGA and other sport governing bodies within the group of private entities subject to Title III of the ADA. The PGA is engaged in commerce as it "is an organization formed to promote and operate tournaments for the economic benefit of its members, a highly skilled group of professional golfers." *Martin v. PGA Tour*, 984 F. Supp. 1320, 1323 (D. Or. 1998). The PGA is a part of the entertainment industry, offering competitive athletic events to the public, which in turn generate

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(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

42 U.S.C. § 12181(7).

sponsorship, television, and advertising revenue to fund the prize money awarded to competitors. *Id.* Thus, a PGA Tour event is a place of public accommodation as "a place of exhibition or entertainment" just as a theater, concert hall, [or] stadium, . . ." 42 U.S.C. § 12181(7)(C). The golf courses where the PGA holds events fit clearly within the identified coverage of Title III as "places of exercise or recreation." 42 U.S.C. § 12181(7)(L).

Additionally, Congress is very knowledgeable about sport governing bodies and if it had any intention of exempting them from coverage, professional sport leagues and other governing bodies would have been named as exempt.[19] If Congress intended to exempt professional leagues and other sport governing bodies from the Americans with Disabilities Act, the statutory language would reflect that specific intent.

While the PGA and USGA briefs argue that neither they nor other sport governing bodies are expressly identified in the ADA list, they are not specifically exempted either. In keeping with the broad construction of the legislation, the Supreme Court and other federal courts have applied the ADA to contexts that were not expressly identified by Congress.[20] As a Tour

19. We need only look to the relationship between professional sport leagues and the Sherman and Clayton Antitrust Acts to find specific statutory exemptions for professional sport leagues in the Sports Broadcasting Act of 1960, 15 U.S.C. § 1291-1294, and Major League Baseball with the enactment of the Curt Flood Act of 1998, 15 U.S.C. § 27.

20. *See, e.g., Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998) (applying ADA to inmates in state prison system); *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237, 1241 (11th Cir. 2000) (Title III not inapplicable as a matter of law to cruise ships); *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 28-29 (11th Cir. 1999) (applying Title III of ADA to Indian reservations operating casinos as places of entertainment); and *Bowers v. NCAA*, 2000 U.S. Dist. LEXIS 16104 (D. N.J. 2000); *Tatum v. NCAA*, 992 F. Supp. 1114, 1119-1120 (E.D. Mo. 1998) and *Ganden v. NCAA*, 1996 U.S. Dist. LEXIS 17368 (N.D. Ill 1996) (applying Title III to the National Collegiate Athletic Association as an operator of a place of public accommodation).

competitor Casey Martin is a participant in an activity provided by the PGA as a place of public accommodation.

The briefs of the *amici*, USGA, ATP/LPGA, and Equal Employment Advisory Council argue that even if they are places of public accommodation within the meaning of the ADA, the competition areas are not subject to the ADA under the theory that Tour events are mixed-use. This debate is flawed and incidental, because every public accommodation has mixed uses. As a place of public accommodation, the PGA has many different uses for a myriad of individuals involved in staging a PGA Tour event. The PGA provides opportunities for employees to work. Obviously employees who work for the PGA will be covered by Title I and the private areas open to employees only will not be subject to Title III. The PGA also provides opportunities to participate in the events as competitors and spectators which meet the statutory definition of activities covered under Title III. Competitors, spectators, and members of the media are some of the myriad of individuals who will be participating in the events. These individuals are there to enjoy the benefits and privileges of the tournament operated by the PGA.

In the alternative, the manner in which a PGA event is operated does not lend itself to the geographic lines of separation proffered by the *amici*. Participants in the benefits and services provided by the PGA are in all areas of the golf course. Event volunteers, photographers, writers, VIPs, sponsors, and some spectators are often within the competition areas and the golfers may find themselves in the spectator areas when chasing down an errant shot. Thus, the competition area is sometimes hard to define geographically because the lines between the competition and the spectator areas are blurred.[21] Moreover, the cases relied

21. During the competition, the placement of the ropes are arbitrary as they are often moved as tournament play proceeds and a stray shot enters the spectator areas and golfers must play their balls from where they landed. The placement of the ropes is also such that there is not a single monitored entrance and exit to the competition areas. It is not (Cont'd)

on by the *amici* are distinguishable from *Martin*.[22] In those cases the mixed use areas were defined as private employee-only enclaves within a public accommodation that the public on the cruise ship or the film studio production lot could not access. Casey Martin is not an employee in an employee-only area. The competition created by the PGA is open to the general public. Any member of the general public can pay a $3,000 entry fee which entitles them to compete for a spot on the PGA Tour. In addition, the competition areas during the actual presentation of the Tour event are also open to many people, spectators and competitors alike, who respond to the invitation from the PGA to experience the entertainment and exhibition it provides.

C. Title III Prohibitions Are Not Restricted To Only Clients Or Customers. Any Individual Discriminated Against Is Entitled To Protection.

The PGA contends that even if Title III applies to competition areas of a professional sport event, that Title III limits its scope to only "clients or customers" of the place of public accommodation. The PGA then contends that Martin is not consuming and using the services, but that he *is* the goods and services being provided. This contention is contrary to the express language in Title III and the legislative intent; it is a strained and overtly narrow definition of "client or customer"; and it is also a gross over-simplification of the presentation of a professional PGA Tour event.

Section 12182(a) provides

> No *individual* shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges,

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completely restricted access, as the final group of golfers is often trailed by spectators walking along with the competitors on the fairways.

22. *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237 (11th Cir. 2000) and *Jankey v. Twentieth Century Fox Film Corp.*, 212 F.3d 1159 (9th Cir. 2000).

> advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation. (Emphasis added).

The reference to "clients or customers" is restricted to section 12182(b)(1)(A)(iv) which provides: "For purposes of clauses (i) through (iii) of this subparagraph, the term 'individual or class of individuals' refers to clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement." While the terms "client or customer" are not defined, it is clear that Congress' use of these terms was not intended to restrict the general class of persons protected under Title III, and the comprehensive and broad remedial framework established in the ADA. If Congress had intended Title III protections to be restricted to "clients and customers", it would not have instead chose to use the broader term "individual" in the general prohibition paragraph reflected in section 12182(a). The terms "client or customer" expressly apply only to subparagraph (A) of section 12182(b)(1). Casey Martin's claim arises under section 12182(a) rather than section 12182(b)(1)(A). This paragraph, *(a) General rule*, does not require that an individual also be defined as a "client or customer" in order to be afforded protection under section 12182.

The use of the terms "clients or customers" was intended to ensure that a public accommodation's obligations are not extended or changed by virtue of its lease or contractual arrangements with another entity, and to clarify that a public accommodations' obligations do not extend to the clients or customers of the entity with which it enters into leases or contractual agreements. There is no suggestion that Congress intended to restrict the general obligations imposed in section 12182(a). "The purpose of Title III . . . is to extend these general prohibitions against discrimination to privately operated public accommodations and to bring individuals with disabilities into the economic and social mainstream of American life."

H.R. Rep. No. 101-485, pt. 2, at 99 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 381-82.

Use of the broad term "individual" in section 12182(a) was most surely intended to authorize the broadest and most inclusive application of Title III protections, including protecting Martin who is an *individual* with a disability. Assuming *arguendo*, that the terms "client or customer" used in section 12182(b) restrict the meaning of the term "individual" used in section 12182(a), Martin is a client or customer of a place of public accommodation. Section 12182 does not specifically define the terms "client or customer"; thus, these terms must be construed according to their ordinary and natural meaning. *Curtis-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 81, 115 S. Ct. 1223, 131 L. Ed. 2d 94 (1995); *Neff v. American Dairy Queen Corp.*, 58 F.3d 1063, 1066 (5th Cir. 1995), *cert. denied*, 516 U.S. 1045, 115 S. Ct. 704, 133 L. Ed. 2d 660 (1996). *Webster's Dictionary* defines the term "client" as "a person who engages the professional advice or services of another." The term "customer" is defined as "one that is a patron or that uses . . . services." As a participant Martin most assuredly is a client and customer of the PGA when it operates and presents a PGA Tour event. While Martin may be providing goods and services to spectators, members of the media, and sponsors, he also simultaneously consumes goods and services directly and inextricably related to his *access to and use of* the place of public accommodation. Martin consumes the opportunity to participate as a competitor in an elite professional golf event operated by the PGA. He consumes the sport of golf. He may be consuming it differently than a spectator, sponsor, or media representative — but the purpose and manner in which services or goods are used is not relevant to the applicability of Title III to the place providing the goods or services. The PGA presents and stages a premier golf sporting event. The PGA would like to define their service as only a viewing opportunity for one class of persons — spectators. However, in addition to a viewing opportunity, the PGA also provides participation opportunities to persons such as Martin.

Title III expressly identifies the "opportunity to participate" as a protected activity. 42 U.S.C. § 12182(b)(1)(C). This participation has already been interpreted to include participating in amateur sport contests. *See Bowers v. NCAA*, 2000 U.S. Dist. LEXIS 16104 (D. N.J. 2000) and *Tatum v. NCAA*, 992 F. Supp. 1114, 1119-1120 (E.D. Mo. 1998). The PGA has offered and indeed no legitimate reason exists to exclude professional sport contests from Title III's protections. In this case PGA is the operator of a place of accommodation just as the NCAA is an operator and/or exerts significant control over the operations of places of public accommodation. Interestingly, both the NCAA and the PAC 10 Athletic Conference permitted Casey Martin to use a cart during NCAA and Conference competitions. During a PGA Tour event, the PGA takes over the golf course and exerts total control over its operations including: regulating ticket prices; controlling the types of beverages and goods that may be sold; regulating profits earned from concession sales; controlling broadcast and media rights; and controlling who will be allowed to participate in the activities taking place at the golf course. This same level of control resulted in the NCAA being found to be an "operator" of a place of public accommodation, and the same result should apply to the PGA. *Tatum*, 992 F. Supp. at 1120.

II. THE ADA REQUIRES A MODIFICATION OF A RULE CREATED BY A PROFESSIONAL SPORT ORGANIZATION IN ORDER TO PROVIDE A REASONABLE ACCOMMODATION TO A PERSON WITH A DISABILITY UNDER TITLE III.

A. The District Court Properly Found that Martin's Use of a Golf Cart Was Not A Fundamental Alteration Of The PGA Tour Competition

Title III at Section 12182(b)(2)(A)(ii) identifies, as discrimination,

> a failure to make reasonable modifications in policies, practices, or procedures, when such

> modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless *the entity can demonstrate* that making such modifications would *fundamentally alter* the nature of such goods, services, facilities, privileges, advantages, or accommodations. (Emphasis added).

The district court in *Martin* properly followed and applied the standard adopted by the Fifth Circuit in *Johnson v. Gambrinus Company/Spoetzl Brewery*, 116 F.2d 1052 (5th Cir. 1997). In *Johnson*, the Fifth Circuit held that in determining whether a reasonable modification would result in a fundamental alteration of the place of public accommodation, the inquiry must focus on the "specifics of the plaintiff's or defendant's circumstances and not on the general nature of the accommodation." *Id.* at 1060. The district court conducted an extensive fact finding analysis and determined (1) that nothing in the rules of golf requires or defines walking as part of the game; (2) the game of golf generally consists of playing a ball from teeing ground into the hole by a stroke or successive strokes in accordance with the rules; (3) Martin explored the possibility of using other various artificial aids to walking such as in-shoe orthosis and ankle-foot orthosis; (4) while injecting the element of fatigue may be a cognizable purpose, the fatigue factor cannot be deemed significant under normal circumstances; (5) approximately only 500 calories would be expended by walking a golf course in a five hour time period; (6) PGA golfers have numerous intervals of rest and opportunities for refreshment or calorie replacement; (7) fatigue due to low intensity exercise is primarily a psychological phenomenon; and (8) that Martin's disabling condition caused him more fatigue, even when provided the use of a cart, than the average PGA Tour golfer endured. *Martin*, 994 F. Supp. at 1249-1252, *affirmed*, 204 F.3d 994, 1000 (9th Cir. 2000). Since the *purpose* of the walking rule was not being obstructed by permitting Martin to use a cart, the requested modification did not fundamentally alter the public accommodation, i.e. the golf

competition. This finding of fact must be undisturbed on appeal unless clearly erroneous. A finding is clearly erroneous only "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542 (1948); *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, 291, 80 S. Ct. 1190, 1200 (1960).

Whether an alteration is fundamental is a fact question even though what standard must be used to determine what is fundamental may pose a mixed question of law and fact. The district court used an individualized, fact finding inquiry examining both the purpose of the rule from which Martin sought a modification to determine its impact on the nature of the place of public accommodation, (i.e. the Tour competition), and Martin's individual circumstances attendant to his disability. The only purpose proffered by PGA was that the rule requiring all competitors to walk was to inject fatigue into the Tour competition. The district court and Ninth Circuit accepted the PGA's purpose as cognizable but further found that the proffered purpose, *fatigue injected into the competition*, was not being fundamentally altered since Martin's individual circumstances caused him significant fatigue.

Both the district court and the Ninth Circuit rejected the PGA's argument that any rule with a cognizable or rational purpose could not be modified without resulting in a fundamental alteration. The PGA and USGA also suggest that unless their rule is shown to be a pretext for discrimination, there is no need to determine whether the rule, if waived, could fundamentally alter the Tour competition. (PGA Brief at p. 35.) The PGA Tour and USGA's arguments and the decision of the Seventh Circuit in *Olinger v. United States Golf Association*, 205 F.2d 1001 (7th Cir. 2000) ignore the clear language of section 12182(b)(2)(A)(ii) of the ADA. First, the statute requires that if a disabled individual requests a place of public accommodation to make a reasonable modification, such

modification must be made, unless the place of public accommodation can demonstrate that the specific modification requested would fundamentally alter the nature of the public accommodation. The burden of proof is squarely upon the entity seeking to avoid providing a reasonable modification, in this instance the PGA. To require Martin to prove that the rule is a pretext for discrimination is contrary to the unambiguous language of the statute and would improperly impose a burden of proof that is not created by the statute. Second, unlike Title I where a plaintiff may have to demonstrate that the alleged non-discriminatory reason for his or her discharge is a pretext for discrimination, Title III requires no such inquiry.[23]

The order of proof provided in section 12182(b)(2)(A)(ii) is unambiguous. A Title III plaintiff must demonstrate (1) that he is disabled; (2) that a modification has been requested; and (3) that the modification is reasonable. *Martin*, 994 F. Supp. at 1248; and *Johnson v. Gambrinus*, 116 F.3d 1052, 1059 (5th Cir. 1997). The burden then shifts to the operator of the public accommodation to demonstrate that the requested modification would fundamentally alter the nature of the public accommodation. *Johnson* at 1059. The PGA's proposed analysis would effectively render Title III applicable only to instances of intentional discrimination and eliminate its burden of proof.

23. A Title I plaintiff can prove she was discharged because of her disability either by proffering direct evidence, or if direct evidence is lacking, through a three-stage order of proof articulated by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). The Title I plaintiff must first establish a *prima facie* case of discrimination by showing that "she is a member of a protected group who has been denied an employment opportunity for which she was otherwise qualified." *Lemire v. Silva*, 104 F. Supp. 2d 80, 90 (D. Mass. 2000). This showing gives rise to an inference that the employer discriminated due to the plaintiff's disability. The burden then shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for discharging the employee. If the employer can do so, the special benefit of the first showing disappears and the plaintiff must show that the employer's proffered non-discriminatory reason is a pretext for discrimination.

Title III outlaws not just intentional discrimination, but also practices that have a unequal impact upon persons with disabilities even in the absence of any conscious intent to discriminate.

> In enacting the ADA, Congress specifically found that individuals with disabilities continually encounter various forms of discrimination, including *outright intentional exclusion*, the *discriminatory effects* of architectural, transportation, and communication barriers, overprotective rules and policies, *failure to make modifications* to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and *relegation to lesser services, programs, activities, benefits*, jobs, or other opportunities.

(Emphasis added). 42 U.S.C.S. § 12101(a)(5). The ADA was enacted "to provide a clear and comprehensive national mandate for the *elimination* of discrimination against individuals with disabilities." (Emphasis added). 42 U.S.C. § 12101(b)(1). Congress clearly intended to protect disabled persons not just from intentional discrimination, but also from thoughtlessness, indifference, and benign neglect. *Crowder v. Kitagawa*, 81 F.3d 1480, 1483-1484 (9th Cir. 1996). Any entity, sport organization or not, under the ADA bears the burden to demonstrate that the requested modification will result in a fundamental alteration to the goods or services. It would be contrary to the clear language of the statute to create a presumption favoring a sport organization, or to impose an improper burden of proof to the disabled individual requesting the modification. The PGA failed to sustain what was clearly its burden of proof and the findings of the district court should not be disturbed.

B. ADA Does Not Provide For Any Presumption Or Deference For Discriminatory Rules Created By Sport Organizations

The PGA attempts to distinguish between substantive[24] and nonsubstantive rules. Presumably, a waiver or modification of a nonsubstantive rule would not fundamentally alter their Tour competition and the waiver or modification of any substantive rule would fundamentally alter their Tour competition. PGA also states that it is "entirely appropriate" for a court to determine whether a rule is substantive, but an individual or case-by-case inquiry is not the correct standard to use in reaching its determination. (PGA Brief at p. 34). Section 12182(b)(2)(A)(ii) mandates that a place of public accommodation must make "reasonable modifications in policies, practices, or procedures". This section does NOT provide that only *nonsubstantive* "policies, practices, or procedures" must be modified. The PGA is attempting to rewrite the statute and restrict the Congressional mandate to only *nonsubstantive* rules. All policies, practices, and procedures are subject to modification. The PGA has provided no rationale or justification for this revision of the statute, and certainly restricting or limiting the scope of the statute would run contrary to the broad remedial intent clearly expressed by Congress.

The USGA contends that a waiver of any rule is not required if the purpose of the rule is rational. USGA *amicus* brief at p. 20. A rule is apparently rational, under the analysis of the USGA, if the sport organization adopting the rule determines in good faith that waiver of the rule might result in a substantial competitive advantage. As precedent, the USGA offers several cases in which sport organization rules were challenged on antitrust grounds.[25] The USGA's argument is squarely

24. The PGA defines a "substantive rule" as one that "is intended to, and potentially does, affect the outcome of a particular competitive event." (PGA Brief at p. 10, n.12).

25. *NCAA v. Board of Regents*, 468 U.S. 85 (1984) (antitrust challenge to broadcast limitations of college football); *Gunter Harz*

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wrong. Antitrust law burdens are not the proper standard for courts to use when determining whether a rule should be modified for an athlete with disabilities. The USGA's argument relies on a standard in which a plaintiff alleges an anti-competitive impact of a sport rule. Once the plaintiff establishes the initial burden of a substantial market foreclosure, the burden shifts to the defendant to establish a rule of reason defense. This defense requires that the rule is rationally related to a legitimate goal of the sport and is applied in its least restrictive form. Nowhere in the ADA statute or legislative history is there language which resembles this defense or even a suggestion that courts should adopt such a standard. In effect, such a standard would give sport governing bodies an open license to discriminate against those with disabilities, provided there was a rational reason for a particular rule. This flies in the face of the broad and comprehensive protections mandated by Congress.

When faced with lawsuits involving the rulemaking authority of sport governing bodies, courts generally adhere to a theory of limited judicial review. While limited in its power to review, the theory does not suggest that courts will defer to the unfettered judgments of professional sport leagues and other sport governing bodies. Any characterization from the USGA, ATP/LPGA briefs to the contrary is inaccurate. In general, precedent shows that courts will intervene in sport governing body decisions in a variety of circumstances, such as situations where the sport governing body exceeds the scope of its authority, breaks its own rules, acts in an arbitrary and capricious manner, violates public policy, or violates constitutional rights or federal

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Sports, Inc. v. United States Tennis Association, 665 F.2d 222 (D. Neb. 1981) (antitrust challenge to USTA rules barring the use of certain tennis rackets in sanctioned competition); and *Brookins v. International Motor Contest Association*, 219 F.3d 849 (8th Cir. 2000) (antitrust challenge to rules barring transmissions like those manufactured by plaintiffs from auto races).

statutes.[26] Judicial intervention is warranted on statutory grounds under the ADA, as well as public policy grounds favoring the integration of disabled athletes into mainstream athletics wherever possible. *See* Americans with Disabilities Act, 42 U.S.C. §§ 12101(a) and (b) and Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220503(a)(13). According to their briefs, petitioner and *amici* cannot agree on the definition of a fundamental alteration, so how can the courts trust that proper, fair, and just decisions will be made which will ensure that elite level athletes with disabilities can participate, compete, and avoid segregation from non-disabled competitors?

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26. *See Atlanta National League Baseball Club v. Kuhn*, 432 F. Supp 1213 (N.D. Ga. 1977) (Major League Baseball commissioner exceeded scope of authority in penalty levied on Atlanta Braves); *Lindland v. USA Wrestling Association*, 2000 U.S. App. LEXIS 21754 (7th Cir. 2000) (USA Wrestling and USOC declined to follow their own rule on qualification for US Olympic Greco-Roman wrestling competitors); *California State University, Hayward v. NCAA*, 47 Cal. Ap. Ed 533 (Cal. Ct. App. 1975) (athletic association violated its own rule when applying rule retroactively); *Christ the King Regional High School v. Catholic High Schools Athletic Association*, 624 N.Y.S.2d 755 (1995) (athletic association violated own rule and acted in arbitrary and capricious manner in applying rule limiting out of state play); *Louisiana H.S. Athletic Association v. St. Augustine High School*, 396 F.2d 234 (5th Cir. 1968) (black high school singled out and subjected to different league entrance criteria in athletic association made up of white schools); *Ludtke v. Kuhn*, 461 F. Supp. 86 (S.D.N.Y. 1978) (Major League Baseball's rule barring female reporters from locker room violates equal protection clause); *NCAA v. Board of Regents*, 468 U.S. 85 (1984) (college football broadcasting limitations violate antitrust law); *Philadelphia World Hockey, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (1972) (NHL reserve clause and other rules restricting free agency subject to antitrust law when challenged by third party competitor); *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1977) (NFL free agent compensation rule violates antitrust law); and *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998) (rule limiting assistant coaches income violates antitrust law).

C. Permitting Casey Martin To Use A Cart Was A Reasonable Modification

The finding by the district court and affirmed by the Ninth Circuit that Martin's requested modification was reasonable and would not fundamentally alter the PGA Tour competition was clearly supported by the evidence. The petitioner and *amici* focus on two points in challenging the reasonable modification that Casey Martin requested. First, they argue that it alters a substantive rule of golf. We disagree. While the PGA says walking is fundamental, an examination of the 400 year old rules of the game shows us that in the early days of the game, gentlemen in Scotland rode horseback from shot to shot on the course.[27] Also one must further question whether the walking rule is substantive in that it is not codified in the USGA Rules of Golf [28] as published by the USGA and the Royal and Ancient Golf Club of St. Andrews, Scotland. The rules of golf are extensive and complex. Currently the USGA's rules of golf number 34 with three appendices and well over 125 subsections. The Royal and Ancient Rules of Golf are 170 pages in length. If walking is such an important rule, why is it not clearly stated along with other rules on playing the sport. Furthermore, if walking adds the fatigue element to elite level golf competition and riding in a cart gives an outcome affecting competitive advantage to a golfer, then why do so many Senior PGA Tour and Senior Men's and Women's Amateur Championship competitors choose to walk the course when the rules allow for use of a cart? If riding in a cart altered a substantive rule to the degree proffered by the PGA Tour and *amici*, good competitive judgment would lead *all* senior golfers to use carts to win.

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27. G. Kimball, *Winning is Not Always Special*, IRISH TIMES, November 20, 2000 at 24.

28. The USGA claims the walking rule has been stated as a requirement of the U.S. Open since 1955 via the participant's application form. USGA *amicus* in *Martin v. PGA Tour*, Ninth Circuit Court of Appeals at 21.

Second, Petitioner and *amici* focus on the importance of uniformity in rules and conditions of competitions. It is impossible for the PGA to provide uniform conditions and a level playing field. For example, very few events employ a blind draw for imposing tee times. Those golfers scheduled at optimal tee times may golf under different conditions (heat, humidity, golfer's own preferred time of day) than those in the early morning or later tee times, thus, receiving a competitive advantage by the very rules of the event. It would be interesting to discover the last time crowd favorite Tiger Woods received the early morning or very late tee times. Another example of a lack of uniformity in the rules comes from the criteria for joining the Tour. Qualifying School is widely known as a grueling experience. Those golfers who win an exemption onto the tour are given the advantage of not having to go through Qualifying School where even the best of golfers may have a bad showing and miss the cut for the Tour.

One reason elite disabled athletes seek integration with non-disabled athletes is due to the manner in which disability sport is organized — by disability, not sport. Elite disabled athletes seek full integration with non-disabled competitors with limited rule modifications on the basis of their disability.[29] As an elite level golfer Martin only requested that modification that was absolutely necessary to afford him the opportunity to participate. Put bluntly, using a cart is the *only* way he can play. With each step to and from the cart to shots and into the rough for stray balls, Martin risks breaking his leg which may lead to its amputation. Martin is still the only athlete on the Tour with a modification of the walking rule. In fact, in the two years since Martin received his injunction, the Tour has not seen a

29. Some may suggest that both Tom Dempsey and Jim Abbott received rules modifications since they were permitted to employ techniques or wear assistive devices not normally permitted. Interestingly, both the NFL and Major League Baseball allowed these potential "modifications" without hesitation. Additionally, permitting Abbott and Dempsey to participate did not create a flood of requests from disabled baseball and football players.

rise in the number of competitors with a disability seeking to invoke the ADA to modify a rule. As disclosed by the USGA in its *amicus* Brief, it has only received two requests for modifications from golfers in this same time period. *See Olinger,* 205 F.3d 1001 (7th Cir. 2000) and *Jones v. USGA*, No. A-00-CA-278 JN (W.D. Tex. Aug. 30, 2000), *appeal pending* (5th Cir. No. 00-50850). Thus, there is not likely to be a groundswell of competitors seeking individual accommodations.[30] Additionally, those involved in the sanctioning bodies of golf are well-versed in rule and decision making and conducting such individual assessments if requested. The USGA essentially conceded that not only will individual assessments be necessary, but that it is perfectly capable of handling such requests.[31]

30. Although reluctant to even respond to the "far fetched" scenarios scattered throughout the ATP/LPGA *amici* brief, it is important to note that most elite and amateur sport competitions organized solely for people with disabilities conform to the same rules as those for non-disabled sport. For example, both the wheelchair basketball and dwarf basketball competitions use a standard basket height and three point shot distance. The suggestion that a "short" person would request a lower basket or closer three point shot distance is insulting to disabled and non-disabled athletes alike.

31. USGA approved *A Modification of The Rules of Golf for Golfers With Disabilities* in 1997 (available at: http://www.usga.org/rules/golfers_with_disabilities.html). Therein USGA specifically states that the desired result, of the modified rules, should allow the disabled golfer to play equitably with a non-disabled individual. The modified rules also establish a Committee procedure whereby individual requests can be reviewed.

CONCLUSION

Elite professional disabled athletes rarely seek modification of rules. Instead, as with any other elite athletes, non-disabled or otherwise, disabled professional athletes seek to compete on an even playing field, according to the rules of the sport played, all consistent with the truest nature and spirit of competition and sportsmanship. Several notable disabled athletes have participated in non-disabled professional and Olympic sport without modification of the rules. Prominent disabled athletes include place kicker Tom Dempsey (NFL), outfielders Pete Gray, Jim Eisenreich, and Curtis Pride and pitchers Bert Shepherd and 1988 Olympian Jim Abbott (MLB), guards Ervin "Magic" Johnson and Mahmoud Abdul-Raouff (NBA), 2000 Olympic 10,000 meter runner Marla Runyon and pentathlete Jackie Joyner-Kersee (USA Track and Field), and Robert Feliciano (USA Luge). Athletes, both non-disabled and disabled, inspire those around them, just as the nature of sport inspires the athlete.

Many watch disabled athletes compete in sheer disbelief at the courage and passion reflected in the athletes. The value and importance of sport for people with disabilities is reflected at all levels of society. Hundreds of organizations exist to develop recreational and competitive sport programs for people with disabilities. From grassroots efforts to organize the first wheelchair marathon in a community, to selection of athletes for the United States Paralympic Team or Deaf World Games Team, many people and organizations contribute to opening doors and opportunities for people with disabilities. But perhaps the most defining moment for people with disabilities, including athletes, occurred on July 26, 1990 with the passage of the Americans with Disabilities Act. Casey Martin's requested modification was reasonable, and does not fundamentally alter the PGA Tour competition. The judgment of the Court of Appeals in this matter should be affirmed in all respects.

Respectfully submitted,

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